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RAILROAD CASES

EDITED BY LAWRENCE LEWIS, JR.

A COLLECTION OF ALL THE

RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA AND ENGLAND

VOL. XV.

NORTHPORT, NEW YORK
EDWARD THOMPSON

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THE CHAS. M. GREEN PRINTING CO.
74 and 76 Beekman St.
NEW YORK

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METROPOLITAN ELEVATED RY. CO.

v.

MANHATTAN RY. CO., NEW YORK ELEVATED RY. CO. et al.

(*Advance Case, Court of Common Pleas, New York City. April* 15, 1884.)

The Board of Directors of a railroad company leased the same to another company upon certain terms. Subsequently, by agreement the said leases were modified in their terms, a bill being filed by the first-named company to annul the last-mentioned agreement. *Held*, that as they had ample remedy at law by an action to recover rent due under the original lease, equity had not jurisdiction to grant the relief sought.

In the above case a third railroad company had also leased its road to the company first named, and was a party to the agreement specified above, and directly interested therein. *Held*, that as said third company could not by an action at law on the lease be released from its liability under the agreement, this circumstance would alone confer upon the court jurisdiction to grant the equitable relief sought.

Where a bill in equity is filed which affords no ground for equitable relief, but the facts proven show that the plaintiff is entitled to legal relief, the court will not dismiss the bill.

Where the directors of a corporation enter into an agreement on its behalf the corporation may itself subsequently apply in equity to have said agreement set aside on the ground of fraud. The corporation is not debarred from seeking such relief on the ground that it was a party to the fraud.

A railroad company leased its road to another company, and subsequently by agreement modified the terms of the lease. A bill being filed to set aside the agreement, *held*, that the objection could not be raised that the original lease was a nullity, being made without authority of law, and that the effect of a decree in accordance with the prayer of the bill would be to reinstate it, as it did not follow that such would be the result.

Where one stockholder institutes prompt proceedings to set aside an alleged illegal agreement entered into by the directors of a corporation on its behalf, this will enure to the benefit of all the stockholders. Other stockholders will not therefore be guilty of laches because they fail likewise to institute such proceedings, or to join therein.

Stockholders are not guilty of laches in not acting together at once to set aside an alleged illegal agreement entered into by directors. They cannot be expected to take such action until the next meeting to which they are legally summoned to elect a new board of directors to assert their rights.

In such case the new board of directors may institute proper proceedings to nullify and set aside the alleged illegal and wrongful agreement of the previous board.

Where a party has obtained an injunction to restrain the stockholders of a

corporation from bringing suit to set aside an agreement entered into between itself and the corporation, it cannot in a subsequent suit by the corporation to set aside such agreement set up laches on the part of the stockholders in moving to set it aside.

The mere filing of a bill of peace to prevent the institution of a suit will not of itself produce that effect, unless preliminary or final judgment be entered thereon.

A railroad company leased the lines of two other companies, and subsequently got into financial difficulties. A receiver was appointed on application of the attorney-general, and afterwards the three companies having agreed upon a modification of the leases, made application to have the receiver discharged, and the property restored to the company lessee. This was done, the decree expressly reserving to the court the power of alteration or modification. In a suit subsequently brought by one of the companies lessor against the company lessee to set aside the above agreement modifying the release on the ground of fraud, *held*, that as the company complainant had not been a party to the suit instituted by the attorney-general, the circumstances did not debar it from moving to set aside the agreement.

Where directors have entered into an illegal contract, and subsequently in a suit to which the corporation is a party have assented to a judgment affirming the validity of such contract, this will not debar the corporation from taking steps to set the contract aside.

The corporation complainant was held entitled to the relief prayed for, viz., the setting aside of the alleged fraudulent agreement, notwithstanding the fact that it was impossible to restore all parties thereto to the exact status occupied by them before the agreement was entered into. The other parties having entered into such agreement with full knowledge that the stockholders of the corporation defendant claimed that the same was illegal and void, must abide the consequences of the annulment of the agreement, and this notwithstanding that they have paid out money on the faith of the agreement which cannot be restored.

It was unnecessary as a condition precedent to the relief sought to make tender of such money so paid out and expended.

The evidence in this case held insufficient to establish actual fraud upon the part of the directors of a railroad company in leasing the road to another company, and subsequently entering into an agreement modifying the terms of the lease. They did not enter into this scheme to benefit themselves at the expense of the corporation.

The charter of a railroad company provided that its directors were to manage its business and affairs. *Held*, that said directors had no power to lease the road without the assent of the stockholders. *Held* further, that they had no power to bind the corporation by an agreement modifying important covenants in an existing lease without the assent of the stockholders.

A railroad corporation can only effect a lease of its road or make substantial modifications of an existing lease by the concurrent action of its board of directors and its stockholders.

Where the interests of two railroad companies are directly antagonistic, agreements between them, entered into by their boards of directors, are voidable at the option of the stockholders of one company, three of the board of directors of which are directors and stockholders in the other company.

In such case it is immaterial that the three stockholders in question constituted a minority of the board of the company seeking to set the agreement aside, and were a minority of the board at the meeting of the directors adopting the agreement.

One railroad company leased its road to another. Subsequently, the board of directors of the company lessor, three of whom were also members of

the board of directors of the company lessee and stockholders therein, entered into an agreement modifying the terms of the lease to the disadvantage of the company lessor. The interests of the two companies were directly antagonistic. *Held*, that the stockholders of the corporation lessor might at their option avoid the agreement.

The fact that the stockholders of the company lessor knew at the time they elected the three directors in question that they were also directors of the company lessee was immaterial.

Where the minutes of a board of directors show that a director voted in a certain way, and the same were read and approved without objection at the next meeting of the board, in the presence of the director in question and others, the court will, in determining how that director voted, abide by the minutes, and will not be swayed by parol evidence that he voted to a contrary effect.

In the Court of Common Pleas for the County of New York.

The facts of this case were found by the court substantially as follows: There were and are in the city of New York three companies, duly organized, owning and operating elevated railroads. These were—

(1) The Manhattan Ry. Co. Capital, $2,000,000.

(2) The New York Elevated R. R. Co. Capital, $6,500,000. Bonded debt secured by mortgage, $8,500,000.

(3) The Metropolitan Elevated Ry. Co. Capital, $6,500,000. Bonded indebtedness secured by mortgage, $10,818,000.

During the year 1878 the roads of all three companies were finished and put in operation.

It being found desirable by the managers of both the Elevated Railroad companies that the elevated railroad system should be under one management, not only for the interest of the companies, but also for the interest of the public, a scheme was devised by which the charter of the Manhattan Co. (whose capital stock was increased for that purpose to thirteen millions of dollars), was to be made use of, and an agreement was entered into between the three companies on the 20th day of May, 1879, called the Tripartite Agreement.

This agreement recites that the said three companies, for the purpose of avoiding the dangers of crossing elevated railway tracks upon the same level, and otherwise securing to the public of New York the advantage of safer and more rapid transit through the action of one directing body, had agreed as follows:

1st. That the New York and Metropolitan companies should execute leases to the Manhattan Co., and after making certain agreements in reference to outstanding contracts and to payments to be made by the New York and Metropolitan companies and to the issue of certain additional first mortgage bonds by the Metropolitan Co. The agreement provided as follows:

10. In consideration of the premises the "Manhattan Co., in addition to assuming payment of the principal and interest of the first mortgage bonds of the New York and Metropolitan com-

panies as above provided, and the payment of cash rental and guaranteed dividend as provided in the lease, hereby agrees to issue and deliver to the New York and Metropolitan companies its two bonds, each for six millions five hundred thousand dollars, payable on demand, one to James A. Cowing, as trustee for the stockholders of the New York Co., and the other to John Baird, as trustee for the stockholders of the Metropolitan Co., with authority to the trustees respectively to use the same, if they see fit, in payment for stock of the Manhattan Co., at par."

Leases were duly executed, bearing date May 20, 1879, by which the New York Co. leased its road, etc., to the Manhattan Co., and the Manhattan Co. agreed to pay, by way of rental, the sum of ten thousand dollars annually to the New York Co., and to pay the principal and interest upon the first mortgage bonds issued by the New York Co., amounting to eight millions five hundred thousand dollars, and also a dividend annually of ten per cent upon the six and one half millions issued by the New York Co., and also all taxes and assessments, etc., of every kind and nature.

The said lease further provided, in case of a failure of the Manhattan Co. to pay the above amounts, or should fail to keep and perform any of the covenants and agreements therein contained, that the New York Co. should have the right to reenter.

Upon the same day, the Metropolitan Co. executed a similar lease of its road, etc., to the Manhattan Co., containing substantially the same provisions as those contained in the lease by the New York Company.

The Manhattan Co., upon the delivery of these leases, duly issued its bonds for six and one half million dollars each, convertible into stock, to Messrs. Cowing and Baird, as trustees, as provided for by the tripartite agreement; and on the 13th of June, 1879, Cowing and Baird surrendered these bonds to the Manhattan Co., and each received 65,000 shares of the Manhattan stock. Cowing transferred the stock issued to him to the shareholders of the New York Co., and Baird transferred the stock issued to him to the shareholders of the Metropolitan Co.. The leases by the Metropolitan Co. to the Manhattan Co., and the tripartite agreement were duly approved by the stockholders of the Metropolitan Co., on the 28th of May, 1879, and also by the stockholders of the New York Co.

On the first day of November, 1879, the Metropolitan Co. made a new mortgage, to secure bonds to the amount of four millions of dollars, with six per cent interest, payable in May and November—two millions of which bonds were issued.

In July, 1879, the following persons were elected Directors of the Metropolitan Co.: Wm. R. Garrison, Wm. Foster, Jr., Geo. M. Pullman, Wm. Adams, Jr., J. F. Navarro, John P. Ken-

nedy, Horace Porter, Fausto Mora, Chas. H. Clayton, John Baird, George J. Forrest.

Pursuant to an act of the Legislature, passed during this year, the number of directors of the Manhattan Co. was increased to thirteen, and at the election held in November, 1879, six were taken from the New York Board of Directors, and six from the Metropolitan Board of Directors, and one was named who was disconnected with either company.

The following persons were elected. directors of the Manhattan Co.:

Wm. R. Garrison, C. W. Field, Geo. M. Pullman, A. H. Barney, J. F. Navarro, Benj. Brewster, Horace Porter, Nathan Guildford, Robert Harris, John Baird, George J. Forrest, Heber R. Bishop, Josiah M. Fiske, Mr. Harris being the thirteenth director, and not connected with either road.

In January, 1880, the following persons were elected directors of the New York Co.:

Cyrus W. Field, David Dows, A. H. Barney, John H. Hall, Josiah M. Fiske, Jesse Hoyt, A. S. Barnes, J. D. Mairs, H. R. Bishop, Benj. Brewster, D. A. Lindley, E. M. Field, N. Guildford.

And in July, 1880, the following persons were elected directors of the Metropolitan Co.:

John Baird, Wm. R. Garrison, Geo. J. Forrest, Wm. Foster, Jr., John P. Kennedy, J. F. Navarro, Horace Porter, Geo. M. Pullman, Wm. Adams, Jr., Chas. H. Clayton, Mortimer Ward.

And in November, 1880, the following persons were elected directors of the Manhattan Co.:

C. K. Garrison, Wm. R. Garrison, George J. Forrest, A. V. Stout, John P. Kennedy, J. F. Navarro, Horace Porter, E. F. Winslow, Arthur Leary, Wm. Foster, Jr., Mortimer Ward, R. M. Gallaway, H. F. Dimock, none of whom were directors in the New York Co., and six of whom were directors in the Metropolitan Co.

In January, 1881, the following persons were elected directors of the New York Co., none of whom were in either of the other boards:

David Dows, A. H. Barney, Josiah M. Fiske, Jesse Hoyt, A. S. Barnes, C. W. Field, John D. Mairs, E. M. Field, H. R. Bishop, Benj. Brewster, D. A. Lindley, John H. Hall, J. A. Cowing.

From the time of the leases above mentioned, the Manhattan Co. continued to operate the roads, but the result not proving satisfactory to the parties interested in the elevated roads, and probably fore-seeing the disasters which subsequently beset the Manhattan Co., the directors of both the New York and Metropolitan companies were desirous of effecting a complete union or merger of these corporations with the Manhattan Co., and negotiations were had between the companies, during the early part of 1880; but in con-

sequence of the great divergence in the views of the persons interested, as to the values which should be affixed to the respective properties in the scheme of the merger, but little progress was made in the settlement of the difficulties.

In July, 1880, however, all the parties agreed that the following questions, namely:

"What are the comparative rates, under all the circumstances, of the stocks of the New York Elevated R. R. Co., and of the Metropolitan Elevated Ry. Co., to be taken as the basis of merging with the Manhattan Ry. Co., under Chapter 503 of the Laws of 1879, to be submitted at the office of the Manhattan Co. on Thursday, the 5th of August, at 10 A.M., each company to have four hours for producing evidence, and one hour for any argument it may choose to submit by counsel or other representatives, the relative rates of said stocks to be expressed in percentages, so that the sum of the two shall be 200?" should be submitted to arbitrators. The arbitrators met, took a large amount of evidence, heard the parties; and on the 15th of September, 1880, made the following report:

The comparative rate at which the stock of the New York Elevated R. R. Co. shall be taken is 110; and the comparative rate at which the stock of the Metropolitan Ry. Co. shall be taken is 90, as the basis of merging with the Manhattan Co.

This decision was accepted by the directors of the companies, and recommended to the stockholders to be carried into effect.

Stockholders' meetings were held, but the scheme seems to have had no vitality, and was allowed to drop and no action was taken.

The profits arising from the elevated roads, not by any means meeting the great expectations which had been indulged in, and taxes having been levied upon the properties of the New York and Metropolitan companies, as well as upon the Manhattan, which do not seem to have been anticipated, the Manhattan Co., in the early part of the year 1881, found that it would be impossible, from the revenues derived from the roads, to meet the various engagements which they had undertaken in the leases above mentioned, and that company became insolvent and unable to meet its obligations—the Metropolitan roads earning barely sufficient to pay all fixed charges upon the road, leaving nothing for a dividend to the stockholders, while the New York road earned sufficient to pay its fixed charges and also a dividend to its stockholders.

In April, 1881, Mr. Gallaway, the President of the Manhattan Co., sent an open letter to the Mayor of the City of New York, arguing that some measures should be taken to relieve the Manhattan Co. of the load of taxes which had been imposed upon it, otherwise it would be driven into hopeless insolvency. Upon this confession being brought to the notice of the Attorney-General of this State, he, on the 18th of May, 1881, upon a bill alleging many

of the facts above-mentioned, and that the Manhattan Co., at the time of the making of the leases above-mentioned, was not a bona fide existing corporation, and that it was hopelessly insolvent, obtained an order to show cause, from one of the judges of this department, returnable on the 27th day of May, 1881, why a receiver of the property of the Manhattan Co. should not be appointed. This motion was adjourned from time to time, and finally, on the 8th day of July, 1881, an order was entered discontinuing the said action.

In the meantime, and on the 29th day of June, 1881, Frank M. Weiler, commenced an action in the Court of Common Pleas, against the Manhattan Ry. Co., the Metropolitan Ry. Co., and the Central Trust Co. of New York, claiming to be the holder of five of the first mortgage bonds of the Metropolitan Ry. Co., and after alleging certain facts and the insolvency of the Manhattan Co., in his complaint, demanded, among other things, that the said companies be enjoined from paying out any moneys to the stockholders of the Metropolitan Co. This complaint was verified by Mr. Frank R. Lawrence, and an order to show cause, with a preliminary injunction, was granted thereon, returnable on the 6th day of July, and was adjourned to July 27th, when the motion was argued; and on the 6th of October, a consent to discontinue was duly given and the motion never decided.

On the said 29th of June, 1881, an action was commenced in the said Court of Common Pleas, by Mr. George S. Lespinasse, claiming to be a bondholder of the New York Co., by a summons and complaint alleging default in the payment of interest upon the bonds and the insolvency, etc., of the Manhattan Co., and praying that the defendant companies might be restrained from distributing any of the income derived from the New York Road among the stockholders of the New York Co., and an order to show cause returnable July 6th, 1881, was granted, with an injunction in the meantime, restraining the companies from distributing any of the income derived from the New York Co.'s properties among the stockholders of said company. I cannot find any evidence as to what became of this order, but the injunction seems still to have existed at the time of the answer served in the Superior Court suit, hereinafter mentioned, and was probably argued at the same time as the motion in the Weiler suit, as it seems to have been adjourned to the same day.

On the first day of July, the Manhattan Co. made default in the payment of the interest on the bonds of the New York and Metropolitan companies, and also in the payment of the dividends upon the stock. The interest upon the bonds was, however, paid out of moneys loaned to the New York and Metropolitan companies, by friends of the companies.

The time for the election of a board of directors for the Metro-

politan Co., was early in July, 1881, and Mr. Kneeland, a large stockholder in the Metropolitan Co., and the holder of proxies from numerous stockholders, deeming a change in the direction advisable, consulted with Mr. Sage as to the persons whom it would be best to secure, and Mr. Gould was mentioned, either by Mr. Sage or Mr. Kneeland, as a desirable person to interest in the elevated railroad enterprise; and Mr. Kneeland saw Mr. Gould, and after repeated interviews with Mr. Gould and Mr. Sage, it was agreed that Mr. Gould and his friends, Mr. Sloan, Mr. Sidney Dillon, Mr G. M. Dodge, and Mr. W. E. Connor (the latter of whom was a partner of Mr. Gould), and also Mr. Sage, should become directors, making a majority of the Board, and Mr. Kneeland duly qualified Mr. Sloan, Mr. Dillon, and Mr. Dodge, by transferring stock in their name, and on the 5th day of July, 1881, the following were elected Directors of the Metropolitan Co.: Jay Gould, Russell Sage, Samuel Sloan, Sidney Dillon, Wm. R. Garrison, Horace Porter, J. F. Navarro, S. H. Kneeland, J. S. Stout, G. M. Dodge, W. E. Connor, three of whom, Messrs. Garrison, Porter and Navarro, were directors in the Manhattan Co.

On the 2d day of July, 1881, the Attorney-General commenced a second action, in the County of Albany, on behalf of the people, against the Manhattan Ry. Co., alleging the insolvency of said company, the complaint in which action was verified by Mr. Frank R. Lawrence. Upon this complaint and certain affidavits thereto annexed, Mr. Justice Westbrook, on the 5th of July, granted an order requiring the Manhattan Co. to show cause, on the 13th of July, at Kingston, Ulster County, why a Receiver should not be appointed.

On the 13th day of July, the motion was duly heard, and Messrs. John F. Dillon and Amos Lawrence Hopkins were appointed Receivers of the Manhattan Ry. Co. The Receivers duly qualified, and entered upon the discharge of their duties.

On the 3d of July, 1881, the New York Co. commenced its action in the Superior Court of this city against the Manhattan Co., and the Metropolitan Co., claiming the right to take into its possession again its property delivered to the Manhattan Co. under the lease and tripartite agreement, because of the insolvency of the Manhattan Co. Upon this complaint and affidavit annexed, an order to show cause was granted, returnable on the 6th day of July, 1881, why the property of the plaintiff, held by the Manhattan Co., should not be delivered over to it, which motion was adjourned by several adjournments to November 28th, 1881.

The Metropolitan Co., on or about the 16th day of July, 1881, put in its answer, setting up the proceedings in the courts as a reason, why the relief asked for by the plaintiff should not be granted, and on the 25th of July the Manhattan Co. also answered.

On the 22d day of July, 1881, the New York Co. presented its petition to the Court, in the second action by the People against the Manhattan Co., alleging the defaults of the Manhattan Co., and praying that the Manhattan Co. and its receivers might be directed to deliver up the property of the New York Co. to that company.

About this time it began to be rumored that the Manhattan Co. had a claim for $13,000,000 against the New York and the Metropolitan companies, because of the issue to these companies of $13,000,000 of the Manhattan stock, and for which these companies had paid nothing; and in August certain philanthropists applied to Mr. Justice Emott and Messrs. Allison & Shaw for their opinion upon the question, and opinions were given that the claim was well founded, because the Manhattan Co. had received no value for its stock. That while there was no doubt but that a corporation might issue its shares for property, yet the shares would be paid only to the extent of the true value of the property received in exchange for them, and if that property was entirely valueless, then not to any extent. That the leases in question possessed no value, because of the large rental reserved in them, and that in point of fact the attempt to pay the charges provided for in these leases had reduced the Manhattan Co. to insolvency, and a letter was sent by a Mr. Earl, claiming to be a stockholder of the Manhattan Co., to that Company, requiring the enforcement of this claim. The Company replied that the claim was a doubtful one, as they were advised, and its enforcement might involve a great deal of costly labor, and that they would prefer that the claim should be enforced by any stockholder who desired so to do.

About the 1st of September, 1881, one John C. Watson, of Boston, filed his bill in the U. S. Circuit Court, for the Southern District of New York, as a stockholder of the Manhattan Co., against the New York, Metropolitan and Manhattan companies, and Messrs. Dillon and Hopkins, as Receivers, claiming that the Manhattan Co. should recover from the New York and Metropolitan companies, thirteen millions of dollars, the par value of the Manhattan stock issued to the New York and Metropolitan companies, and divided amongst their stockholders, as above stated.

On the 27th of September, 1881, the Board of Directors of the Manhattan Co. passed a resolution requesting the Receivers to issue certificates, in order to provide means to meet any deficiency that had arisen, or might arise, in the amounts due to the two lessor companies, application to this effect was made to the court, and was resisted by the New York Elevated R. R. Co. The Metropolitan Co. did not actively resist the application.

The court granted an order for Receivers' certificates, not to exceed in amount one million of dollars, but refused to attempt to make them a lien prior to the liens already existing upon the va-

rious properties. These certificates could not be negotiated, and no money was raised by their means.

The petition of the New York Co. to get back its road was brought to a hearing on the 14th day of September, and had not been decided, when on the 30th day of September the New York Co. presented a supplementary petition, setting forth that the ninety days mentioned in the leases had elapsed, that the payments reserved by the leases had not been made; that they had demanded possession of their property from the Manhattan Co.; and they claimed that they were entitled to the possession of their property, and as it was in the possession of the Court, they asked that it might be surrendered to them.

This motion was denied on the 14th of October, 1881, Westbrook, J., delivering an elaborate opinion, in which he adverts to the claim of the Manhattan Co. against the New York and Metropolitan companies, and suggests that the claim of the Manhattan Co. may be well founded in law.

During the progress of the hearing upon this motion, in September, a suggestion was made by the Attorney-General, that the parties interested ought to arrange a settlement of the various matters of difference between these companies, and negotiations were commenced between the parties; various propositions were broached and discussed, and various modifications of the leases which would enable the Manhattan Co. to continue the operation of the roads were proposed. It seemed to have been conceded, early in the negotiations, that some settlement must and would be made, upon the basis of concessions to be made by both the New York and Metropolitan companies; but there was a great difference of opinion as to how great these concessions were to be, and whether in the new arrangement, the New York Co., in view of its large earnings, should not have some preference, both in amount of rental and in order of payment.

These negotiations finally resulted, on the 13th day of October, 1881, in the appointment of conference committees by each of the three companies. At a joint meeting of the conference committees, Cyrus W. Field, of the New York Co., submitted the following proposition, as a settlement of the controversies, differences and claims between the three companies:

"First.—Discontinuance of all suits and payment to the New York Co. of all moneys due and unpaid it on lease to date, and payment to Metropolitan Co. of interest due on its bonds July 1, 1881, this payment to be made from cash now on hand and first moneys received from the operation of the railways after payment of operating expenses.

"Second.—Lease to the Manhattan Co. to be modified, so that all moneys received by it from the operation of the roads shall be used (1) for the payment of operating expenses and maintenance

of structures; (2) taxes and assessments; (3) interest on bonds of the New York and Metropolitan companies; (4) payment to the New York Co. of six per cent per annum, payable quarterly, on its capital stock; (5) payment of four per cent per annum, payable quarterly, on the capital stock of the Metropolitan Co. from the income derived by the Manhattan Co. from the operation of the lines of railway owned by the Metropolitan Co., if earned, after payment of taxes thereon, operating expenses thereof and interest on its bonds; (6) all income remaining after payments, as hereinbefore provided, to be distributed among the stockholders of the Manhattan Co. until such distribution shall amount to four per cent per annum on its capital stock, the balance over such four per cent to be equally divided between the New York and Metropolitan companies and the Manhattan Co.

"Third.—The three companies to execute an agreement to make the above modification." This proposition was laid before the Boards of Directors of the various companies. Some alterations were suggested, and at length an agreement was reached, on October 22, 1881, as the basis upon which all difficulties were to be adjusted. The principal changes made in the Tripartite agreement and leases of May 20, 1879, being a reduction of the dividend rental from the ten to six per cent, and a provision that the dividend rental to the New York Co. should be paid before that to the Metropolitan Co.

Upon the same day, October 22d, a meeting of the Board of Directors of the Metropolitan Co., at which all were present, except Mr. Garrison and Mr. Navarro, was held, and the following action was taken, as appears by the minutes of that company:

"The President, on behalf of the committtee of four, with power, having charge of the proposition set forth at the last meeting of this Board, reported that an agreement had been made between the three companies, which was read to the Board and submitted for approval. Having been discussed at length, on motion of Mr. Sloan, seconded by Mr. Gould, it was

"Resolved, That the agreement now read between this company, the Manhattan Co., and the New York Elevated R. R. Co., dated October 22, 1881, be and the same is hereby ratified and approved, and that the President and Secretary be and they hereby are instructed to subscribe the said tripartite agreement with the corporate name of this company, to attach the corporate seal thereto, duly attested, and deliver the same as the acts and deeds of this company, in exchange for a duly executed triplicate of said agreement on the part of the said Manhattan and New York companies.

"Which resolution was carried. Eight Directors—Messrs. Sage, Gould, Dillon, Connor, Dodge, Porter, Sloan, and Stout—voted aye; one Director, Mr. Kneeland, voted no."

The plaintiffs claim that the vote of Mr. Stout is not correctly entitled upon the minutes, that he also voted no.

The Board of Directors of the Manhattan Co. also approved of the agreement on the same day, and authorized its President and Secretary to execute the same.

On the 24th of October, 1881, the Board of the Metropolitan Co. met. Present, Mr. Sage in the chair, and Messrs. Gould, Dillon, Navarro, Connor, Dodge, Kneeland, Stout, Porter, and Garrison; and the following proceedings were had:

"The minutes of the last meeting were read and approved. The Secretary informed the Board that after the signing and sealing of the aforesaid agreement by the President and Secretary, an amendment was proposed in certain particulars which was duly considered by the committee and being deemed for the interest of the company, they were agreed to and the agreement amended in the following form with the supplementary agreement thereto appended, and duly signed, sealed and delivered by the President and Secretary in exchange for a duly executed triplicate of said agreement by the New York and Manhattan companies; it was

"Resolved, That the execution and delivery by the officers of the company of the foregoing agreement, dated October 22, 1881, between the New York Elevated R. R. Co., the Manhattan Ry. Co. and this company, with the supplementary agreement of like date thereto annexed, be and the same is hereby ratified, approved and confirmed; and

"Resolved, That the Counsel of the company (under direction of the President) take such measures as may be necessary to carry the said agreements into effect, to procure the railways, property and moneys now in possession of the Receivers of the Manhattan Ry. Co. to be restored to the possession of the said company, and to procure the Manhattan Ry. Co. to be relieved from any injunction order or legal restraint which now prevents or interferes with the perfect discharge by said company of any of its functions or restrains it from carrying on its business.

"Eight Directors, Sage, Gould, Dillon, Navarro, Connor, Dodge, Porter, and Garrison, voted aye; one Director, Mr. Kneeland, voted no; one Director, Mr. Stout, declined to vote, and the resolution was carried."

By the supplemental agreement the rental dividends to the New York Co. were made cumulative, and its claim under the leases were to be paid up to and including October 1, 1881.

On the same day the Directors of the New York Co. met, and approved the agreement, authorizing their officers to execute the same.

This agreement was never ratified in any manner by the stockholders of the Metropolitan Co., which was considered by the counsel of the respective parties as unnecessary.

The interest of the various directors of the Metropolitan Co. in the shares of the several companies on the 22d of October, 1881, seems to have been as follows:

Mr. Gould held twenty-five hundred shares of the stock of the Metropolitan Co., bought along in September; also five thousand shares of the stock of the New York Co., bought in September and October; also twenty thousand shares of the Manhattan Co., bought from Sept. 30 to Oct. 21, 1881.

Mr. Sloan, 100 shares in the Metropolitan, 100 shares in the New York, and 100 shares in the Manhattan Co.

Mr. Russell Sage held, at the time of the election, in July, over 2,000 shares of Metropolitan, about 200 shares in New York, and was short of Manhattan; and on the 21st of October, was short of Manhattan 5200 shares; on October 22d, he bought 3000 shares of Manhattan; October 24, 200; October 25, 2300, and sold, October 25, 100 shares. On the 22d of October, 1881, he held 1200 shares of Metropolitan, and about 900 shares of New York.

Mr. Sidney Dillon held, October 22, 1881, no Metropolitan; 100 shares of Manhattan, and 100 shares of New York.

Mr. Wm. R. Garrison held, October 22, 1881, 518 shares of the Metropolitan Co., 300 shares of the Manhattan Co.

Gen. Horace Porter held, in October, 1881, about 100 shares of Metropolitan, and on October 22, 1881, ten shares of Manhattan, having purchased 1000 shares September 9, and sold them September 28 and 29, and 1000 shares on the 3d and 4th of October, and sold them October 7.

Mr. Navarro held, on the 22d of October, 1881, 1000 shares of the Metropolitan, 6100 shares of the Manhattan, and 4000 shares of the New York Co.

Mr. Kneeland held, on the 22d of October, 1881, about 13,000 shares of the Metropolitan, and 7100 shares of the Manhattan Co., which he sold out subsequently at a profit of about $70,000.

Mr. J. S. Stout, according to the stock ledger, held, on the 22d day of October, 1881, 4002 shares of Metropolitan and 300 shares of Manhattan.

Mr. Dodge does not seem to have held any stock in any of the companies on the 22d of October, 1881.

Mr. Connor, according to the stock ledger, held, on the 22d of October, 1881, 100 shares of the Metropolitan Co., and 1100 shares of the Manhattan Co.

The firm of W. E. Connor & Co. had standing in its name, on October 8, 1881, 12,400 shares of the Metropolitan Co., a large portion of which it claimed was borrowed stock, and transferred for the purposes of the election.

But little reliance is to be placed upon the evidence of the ledger, as to the condition of the holdings of any particular individual, at any given time, as all the stock appearing upon the ledger may

have been sold and resold and sold again many times, long before any transfer of it is made upon the books of the company.

On the 25th of October, 1881, the three companies presented their petition to the Supreme Court in the suit of the People against The Manhattan Ry. Co., at Monticello, Sullivan County, Mr. Justice Westbrook presiding, alleging the making of the agreement of October 22, 1881, whereby all differences between the three companies had been settled and adjusted, and whereby it had been agreed that the Manhattan Co. should obtain immediate possession of the property in the hands of the Receivers, and that such possession was necessary in order that the provisions of said contract of settlement should be carried into effect, and praying a dissolution of the injunction theretofore granted in the action restraining the Manhattan Co. from exercising any of its functions, and a restoration of the railways and property then in the hands of the Receivers, except that the Receivers should be permitted to retain such amount of money as might be necessary to defray the costs and expenses of the administration of the trust.

The Attorney-General not opposing, but submitting the matter to the judgment of the Court, upon the consent of the attorneys for the three companies, and also of the Receivers, an order was made granting the prayer of the petition, the injunction was dissolved and all the property in the hands of the Receivers was directed to be delivered to the Manhattan Co., except the sum of seventy-five thousand dollars, which the Receivers were directed to retain until the further order of the Court.

Prior to this various actions had been commenced against the Mayor, Aldermen and Commonalty of the City of New York to restrain the collection of the taxes imposed as before mentioned, upon the railway property, upon various grounds, and various sums had been paid into Court by the Manhattan Co. Except as here stated, none of the taxes have been paid by the Manhattan Co., except some amounts of capital tax.

On the 27th of October, 1881, Messrs. Burnham & Berry commenced an action in the Supreme Court, as stockholders of the Metropolitan Co., against the three companies, to set aside the agreements of October 22, 1881, as null and void, upon the ground that the nine directors who approved these agreements had violated their trusts, in promoting the interest, rather of the Manhattan Co. than of the Metropolitan Co.; that three of the directors of the Metropolitan Co. were also directors of the Manhattan Co., and because these agreements had never been submitted to the stockholders for ratification.

On November 3d, 1881, Messrs. Gould and Sage were elected directors of the New York Co.

On the 9th day of November, 1881, there was held the regular

annual meeting of the stockholders of the Manhattan Co., at which the above agreement was ratified and confirmed.

At this same meeting of shareholders, the following were inter alia elected directors of the Manhattan Co.: Jay Gould, Russell Sage, Sidney Dillon.

On the 11th day of November, 1881, Benjamin W. Gillette commenced an action in the U. S. Circuit Court, for the Southern District of New York, against the three railway companies, upon a bill filed, containing substantially the same allegations as those in the above complaint of Burnham and Berry, and praying for the same relief. An order to show cause for an injunction, with an ad interim stay was granted, which was disposed of at the same time that the motion for an injunction in the action of Flagg hereinafter mentioned was denied, and the defendants duly answered, and the complainant's bill was on the 26th day of April, 1883, dismissed upon his own motion.

On or about the 14th day of November, 1881, an agreement was proposed to the directors of the three companies, for a complete merger of the capital stock of the New York and Metropolitan companies into that of the Manhattan Co. This agreement provided that the Manhattan Co. should take a surrender or transfer of all the shares of stock of the shareholders of the New York and Metropolitan companies, and issue in exchange therefor the like additional amount of shares of the Manhattan Co., the shares thus to be issued to the shareholders of the New York Co. to be called first preferred stock, and to be entitled to the payment of dividends at six per cent per year, payable out of the net earnings, and if there should be in any year any deficiency, such deficiency was to be made up before any dividends were paid upon any other class of stock. The shares to be issued to the shareholders of the Metropolitan Co. to be called second preferred stock, and to be entitled to the payment of dividends at six per cent per year, payable out of the net earnings of the company during the year, after the first preferred shareholders have received full dividends for all time previous; but, if the net earnings in any year, after the payment of dividends to the first preferred shareholders, did not amount to six per cent, the deficiency was not to be made up out of the earnings of any future year or in any manner whatever. The present shares of the Manhattan Co., amounting to $13,000,000, were to be called common stock and to be entitled to dividends out of the net earnings of the company, after payment of the dividends to the first and second preferred shareholders.

On the 14th of November, 1881, Mr. Cyrus W. Field was elected a director of the Metropolitan Co. in the place of G. M. Dodge, resigned, and at that meeting the above proposed agreement was read to the board, and the following action was taken:

"On motion of Mr. Washington E. Connor, seconded by Mr. Samuel Sloan, it was

"Resolved, That the agreement now read between this company, the New York Elevated R. R. Co. and the Manhattan Ry. Co., dated this 14th day of November, 1881, be, and the same is hereby approved and adopted.

"The yeas and the nays being called, Messrs. Sage, Dillon, Field, Connor and Sloan, five directors, voted 'aye;' Mr. Kneeland and Mr. Stout, two directors, voted 'no.' The resolution was carried.

"On motion of Mr. C. W. Field, seconded by Mr. S. Sloan, it was

"Resolved, That the agreement now approved and adopted by this board be executed by the proper officers of this company. That the president and secretary be, and they are hereby instructed to subscribe the said tripartite agreement with the corporate name of the company, to attach the corporate seal thereto duly attested and deliver the same to the New York and Manhattan companies as the acts and deeds of this company, in exchange for a duly executed triplicate of said agreement on the part of the said New York and Manhattan companies.

"Which resolution was carried, Messrs. Sage, Dillon, Field, Connor, and Sloan voting 'aye;' Mr. Kneeland and Mr. Stout voting 'no;' Mr. Jay Gould declined to vote on both resolutions."

On the same day, at a meeting of the board of directors of the Manhattan Co., the said merger agreement was also approved.

The agreements were duly executed on this day or on the 15th of November, 1881.

On the 21st day of November, 1881, a special meeting of the stockholders of the Manhattan Co. was held, pursuant to a call issued therefor by the board of directors, for the purpose of taking action upon a proposal to issue $13,000,000 of additional stock of the company in order to carry out the merger agreement of the 14th of November, and the following resolution adopted by a vote of 92,583 shares in favor, and 500 shares against its adoption. The following is the resolution:

"Resolved, That the stockholders of this company do hereby sanction and authorize the increase of the capital stock of this company by thirteen millions of dollars, making, with the existing capital stock, a total of twenty-six millions of dollars."

On the 24th of December, 1881, the State engineer and surveyor duly approved the above-mentioned increase of the capital stock of the Manhattan Company, to $26,000,000.

On the 10th of January, 1882, the regular meeting of the shareholders of the New York Co. was held, and the agreements of October 22 and November 14 were thereby approved.

Pursuant to this merger agreement, only 3296 shares of Metro-

politan stock have been converted into Manhattan second preferred; but a large amount of the stock of the New York Co. have been converted into first preferred Manhattan stock.

On the 17th of November, 1881, the Manhattan Co. put in a supplemental answer in the people's suit, setting up the agreement of October 22, and that the company was solvent. On the same day, a trial of the cause was had in the rooms of the attorney-general; some evidence taken, and the attorney-general being satisfied that by the agreements of October 22, the Manhattan Co. had been made solvent, findings of fact were duly made, and a judgment entered, which, after reciting that the said agreements of October 22 were regarded by the court as a just settlement of the controversies between the parties, and removed all question as to the solvency of the Manhattan Co., adjudged that said agreements required no ratification thereof by the stockholders of said corporations or either of them, and confirmed and established the same as a final settlement and conclusion of all questions in the action.

On 22d November, 1881, in the action in the superior court, wherein the New York Co. was plaintiff and the Manhattan and Metropolitan companies were defendants, herein before mentioned, the Manhattan Co. put in a supplemental answer, setting up the proceedings had in the People's suit upon the application of the New York Co. to receive back again its property, and the denial of the application, and that on the 22d of October, 1881, the Manhattan Co. had entered into an agreement and supplemental agreement with the Metropolitan and New York companies, whereby all the matters and things in dispute between the companies had been finally compromised and adjusted.

On the 8th of December, 1881, the attorneys for the respective companies, having appeared before the court, and the facts alleged in the supplemental answer of the Manhattan Ry. Co. being admitted to be true, the court made certain findings of fact, and entered a judgment thereon, adjudging that the agreements entered into by and between the said three companies on the 22d day of October, 1881, were just and valid agreements between the said three companies, and that the same were thereby established as a compromise settlement and adjustment of all matters in dispute between them, and a general settlement of all matters therein.

On the 5th day of December, 1881, one George A. Flagg and others filed a bill of complaint in the United States circuit court for the Southern District of New York, against the three railway companies, alleging in the bill of complaint facts similar to those stated by Gillette in his bill of complaint, and praying for similar relief, and a motion was duly made for such injunction before Mr. Justice Blatchford and was denied by him, he holding that the October agreements were within the power of the board of directors to make, and that they were valid and binding contracts.

On the 9th day of December, 1881, the Manhattan Co. brought its action in the supreme court against the New York Co., the Metropolitan Co., Berry & Burnham and all others who had brought suits against it, and which has been called the Bill of Peace suit, the complaint after setting up the fact of the bringing the various actions, asking an injunction against the bringing of any more suits, and that all the matters in controversy should be therein determined. In this action, a preliminary injunction was granted which was made permanent at the special term, on the 20th of June, 1882, and vacated by the general term in February, 1883, upon the ground that the case presented was not one in which a court of equity should interfere by bill quia timet.

On the 28th of October, 1882, the Manhattan Co. paid to the Metropolitan Co. $339,540, in payment in full of an account for interest and rental due under the agreement of October 22, 1881.

On the 3d of January, 1882, the Manhattan Co. also paid to the Metropolitan Co. the sum of $5000 for the rent of roads, due January 1, 1882, as per lease and modified agreements. Upon the same day a dividend was paid by the Manhattan Co. to the holders of its first preferred stock, and on the 14th day of July following an amount equal to a 1½ per cent dividend, upon the shares of the New York Co., which had not been converted, was paid to the New York Co., but no dividend was paid to the Metropolitan shareholders or to the holders of the second preferred Manhattan stock.

On the 31st of January, 1882, the following resolution was adopted by the directors of the Manhattan Co.:

"Resolved, That the directors of this Manhattan Ry. Co. do elect to become ex-officio the directors of said New York Elevated R. R. Co.

"Resolved, Further, that the directors of this company will now and from henceforth, manage and conduct the affairs of said New York Elevated R. R. Co., as provided by law.

"Resolved, That a copy of the foregoing be sent to the New York Elevated R. R. Co."

On the 1st of April, 1882, a quarterly dividend of one and one half per cent was paid upon Manhattan first and second preferred, and to the New York Co., on the 14th of July, for the New York unconverted stock, but no payment was made to the Metropolitan Co. for its unconverted stock.

On the 7th day of June, 1882, the Directors of the Metropolitan Co. adopted a resolution postponing the election of directors from the second Tuesday of June, 1882, to the second Wednesday of November, 1882.

On the 1st of July, 1882, a quarterly dividend of one and one half per cent was paid on Manhattan first and second preferred, and to the New York Co. for its non-assenting shareholders, and

also $97,500 was paid to the Metropolitan Co., being one and one half per cent on its stock, and the Manhattan collected the dividend from the Metropolitan Co. upon the 3296 shares of converted stock.

A similar dividend was paid October 1st, 1882, in precisely a similar way.

The Manhattan Co. has also paid the interest at the rate of six per cent falling due January 1st and July 1st, on $10,818,000 first mortgage bonds of the Metropolitan Co., and also the interest falling due on the 1st of May and the 1st of November, on $2,000,000 second mortgage bonds of the Metropolitan Co.

On the 8th of November, 1882, the following were elected Directors of the Metropolitan Co.: "Mr. Joseph S. Stout, Mr. Jacob Berry, Mr. Elijah Smith, Mr. Thomas T. Buckley, Mr. Rufus H. Gilbert, Mr. Sidney Shepherd, Mr. Joseph W. Burnham, Mr. Murillo H. Gillett, Mr. Chas. Duggin, Mr. Sylvester H. Kneeland, Mr. Benjamin W. Gillett."

There are several proceedings by the Board of Directors of the companies during the year 1882, which are not referred to, being immaterial to the controversies in this action.

And in December, 1882, this action was commenced by the Metropolitan Co. against the Manhattan and New York companies, to set aside the October agreements, upon the following grounds:

1st. Because the Metropolitan Directors had no power to modify the original lease and tripartite agreement of May 20, 1879, without the consent of the shareholders.

2. Because the Metropolitan Directors were at the time of the making of the October agreements also directors of the Manhattan Co.—one of the contracting parties whose interests were antagonistic to those of the Metropolitan Co.

3d. Because the personal interests of several of the Metropolitan Directors were opposed to those of that company.

4th. Because of actual fraud upon the part of certain Metropolitan Directors, who entered into a scheme to benefit themselves at the expense of their corporation.

The defendant corporations duly answered denying the allegations of breach of trust, and that the directors of the Metropolitan Co. had interests hostile to the company, and alleged that the October agreements were entered into in good faith. The answers further set up the merger agreement of November 14th, 1881, as a defense and the judgment in the People's suit, and also the judgment in the action of the Superior Court suit as a bar to this action.

Upon the 19th of February, 1883, an order to show cause was duly obtained by the Metropolitan Co., represented by new attorneys, from the Superior Court, why the judgment above-mentioned,

entered in that Court on the 8th day of December, 1882, should not be aside, and why the Metropolitan Co. should not be let in to answer or demur. The motion thereon was duly heard before Mr. Justice Freedman, on or about the 20th day of March, 1883, and denied with costs, upon the ground that when the cause came on for trial in its regular order, the counsel for the respective companies agreed as to the findings to be made and the judgment to be entered, and the court settled the findings and gave judgment accordingly, and as there was no irregularity or want of jurisdiction, the parties to the judgment were bound by the adjudication made.

The learned Court further held, that as the application rested substantially upon the claim that if the application were granted, the Metropolitan Co., in consequence of a change of advisers, could present some considerations to the Court which were not presented before, and which, if they had been presented, might and possibly would have led to a different result, no ground was shown sufficient to call for the interposition of the equitable powers of the Court. That the policy of the law was to end the litigation and to hold parties bound by the result after they had their day in court.

The Court further held, that a conclusive answer to the motion was, that at that late day it was impossible to restore the three corporations to the positions they respectively occupied toward each other at the time of the entry of the judgment.

In April, 1883, the Metropolitan Co., obtained another order to show cause why they should not have leave to renew the motion to set aside said judgment of December 8, 1881, or if such leave was denied, why the judgment and findings should not be corrected and amended by striking out the finding of fact that all matters in dispute between the three companies were compromised, settled and adjusted by the agreements of October 22d, and the finding and judgment that said October agreements were valid.

This motion was also heard before Mr. Justice Freedman, and an order was entered denying the motion with costs, August 9th, 1883, from which order an appeal was taken by the Metropolitan Co.

The foregoing statement contains, I believe, a substantially correct narrative of the events which led up to the October agreements and which followed them, as nearly as possible, in their chronological order; and also sets forth the interests which the various directors of the Metropolitan Co., whose action is sought to be attacked, had in the three companies, who were parties to those agreements. I may have omitted some of the circumstances attending these transactions, as the evidence and exhibits are very voluminous, and parts of the same transactions are scattered in many different parts of the record, and I have not been aided in any degree by the submission, by either of the parties, of any statement

of the facts which are claimed to have been established by the evidence; and it has, therefore, required an immense amount of time to extract from this mass of evidence and exhibits the history of these transactions, as they appear upon the record.

James C. Carter, Robert Sewell, and Francis C. Barlow, for the plaintiff.

William M. Evarts, David Dudley Field, A. J. Vanderpoel and W. A. Duer, for the defendants.

Van Brunt, J.—This action is brought by the Metropolitan Ry. Co., to set aside the agreements of October 22, 1881, upon the following grounds:

1st. Because the Metropolitan Directors had no power to modify the original leases and tripartite agreement of May 30, 1879, without the consent of the shareholders.

2d. Because three of the Metropolitan Directors were, at the time of the making of the October agreements, also directors of the Manhattan Co.—one of the contracting parties, whose interests were antagonistic to those of the Metropolitan Co.

3d. Because the personal interests of several of the Metropolitan Directors were opposed to those of that company.

4th. Because of the actual fraud upon the part of certain Metropolitan Directors, who entered into a scheme to benefit themselves at the expense of their corporation.

The defendants admit that the October agreements were not assented to by the stockholders of the Metropolitan Co., and claim that such assent was not at all necessary to the validity of the contract. They further admit that three of the Metropolitan Directors were also, at the time of the making of the October agreements, Directors of the Manhattan Co., but they deny that this circumstance in any way invalidated the action taken. They deny that the personal interests of any of the Metropolitan Directors were opposed to those of that company; and they also deny that there was any actual fraud; and aver that the agreements of October, 1881, were for the best interests of all the parties concerned, and that they presented the only solution of the difficulties and embarrassments which surrounded the elevated railway system, in the summer and fall of 1881.

In addition to the above defenses, the defendants also presented certain preliminary objections to the maintenance of this action, and also certain affirmative defenses.

The preliminary objections are as follows:

1st. No case is presented in this action for the interference of a Court of Equity.

2d. If the October agreements are fraudulent, as the plaintiff contends, then the plaintiff itself was a party to the fraud.

3d. The plaintiff, in its complaint, alleges that the agreements

and leases of May 20, 1879, which it seeks to reinstate, were a nullity, being made without authority of law.

4th. That the October agreements have never been disaffirmed by the stockholders of the Metropolitan Co. in any way, nor even by the directors, by any direct vote.

The fifth and last preliminary objection is the lapse of time, and the acquiescence of the plaintiff.

The following affirmative defenses are also urged:

1st. That the Manhattan Co. had at the time of the commencement of this action already brought its action in the Supreme Court against the New York Co., the Metropolitan Co., and all the persons who had brought actions to set aside the October agreements, in the nature of the old bill of quia timet, asking in its complaint, that all matters relating to the October agreements should be determined in that action, and that the defendants and all others should be restrained from bringing any actions on account of these agreements.

2d. The judgment of the Supreme Court in the action of the People against the Manhattan Ry. Co., entered on the 17th day of November, 1881.

3d. The judgment of the Superior Court of the City of New York, entered on the 8th of December, 1881, in the action wherein the New York Elevated Railroad Co. was plaintiff, and the Manhattan Ry. Co. and the Metropolitan Ry. Co. were defendants.

4th. That restitution cannot be had.

I will first consider the preliminary objections, and then the affirmative defenses, and lastly will discuss the four questions, upon which the plaintiff bases the right to equitable relief, in this action.

The first preliminary objection urged is, that the facts elicited upon this trial, do not present a case for the interference of a Court of Equity.

It is claimed by the defendants that the plaintiff has a complete remedy at law, and, therefore, cannot seek the intervention of a Court of Equity. That the plaintiff could have sued for the rent, which is claimed to be due, under the leases and agreements of May 20th, 1879, and if the October agreements were set up as a defense, they could have been attacked upon precisely the same grounds as they have been in this action.

In Grand Chute *v.* Winegar, 15 Wallace, 373, it was held that a municipal corporation, obligor in a bond, cannot ask in equity that the obligee be enjoined from proceeding at law, and that the bond be surrendered, when the bill alleges that the bond was issued, without authority, in violation of law, and in fraud of the plaintiff; that the obligee knew this when he took it; that the obligee's possession is merely colorable, and that he gave no value

for it, and never had any right or title to it. Such allegations show a complete defense to the bond at law; and a judgment against the obligee at law would give as full protection in every way to the obligor, as a decree in equity.

Mr. Justice Hunt, in this case, uses language, as follows:

"And the result of the argument is, that wherever a Court of Law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a Court of Equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury. The right to a trial by jury is a great constitutional right, and it is only in exceptional cases, and for specified causes, that a party may be deprived of it."

In the 49th N. Y. 373, Allerton *v.* Belden, it was held that the right to apply to a Court of Equity to have a contract annulled exists only when, from the form of the security, the defense cannot be made available at law, or where the instrument sought to be avoided is a cloud upon the title to land, or some other necessity for the interposition of a Court of Equity is shown.

The opinion of Judge Rapallo, page 377, has this:

"The allegations in his complaint disclose a perfect defense at law to any action which might be brought against him on his indorsement, and no fact is stated showing any necessity for the interposition of a Court of Equity, or entitling the plaintiff to become an actor in the matter. The most usual ground for going into equity in such cases formerly was the necessity for a discovery to prove the usury.

"Bills of discovery being now abolished, some ground which formerly would have justified the filing of a bill for relief must appear in the complaint, or it shows no right of action. No authority has been cited sustaining an equitable action on such ground; but on the contrary, it has been uniformly held, that where a perfect remedy, both as to the discovery and relief, can be had at law, the action in equity cannot be maintained, and that this objection is available on demurrer."

In 62 N. Y. 562, the town of Venice *v.* Woodruff, the Court said, at page 467:

"Whether, therefore, the question is regarded as one of jurisdiction or practice, it is established by the later decisions that some special ground for equitable relief must be shown, and that the mere fact that the instrument ought not to be enforced is insufficient, standing alone, to justify a resort to an equitable action."

In the same book, page 533, in Fowler *v.* Palmer, which was the case of an action to compel the surrender of a note past due, on the ground that it had been paid, but not taken up, the Court held that the action could not be maintained in equity, that the

defense of payment was perfectly available to the plaintiff in an action upon the note, and no transfer could prejudice it.

In 79 N. Y., page 202, Globe Mutual *v.* Reas, it was held that an action to procure the cancellation of a written instrument cannot be maintained unless some special circumstance exists establishing the necessity of a resort to equity, to prevent an injury which might be irreparable, and which equity alone is competent to avert. It is not sufficient that a defense exists against the instrument, or that evidence may be lost.

In the case of Troy and Boston R. R. *v.* Boston, Hoosac Tunnel and W. Ry. Co., 86 N. Y. 127, it is said by the Court, Mr. Justice Danforth speaking:

"Although the form of actions and suits, and the distinction between actions at law and suits in equity has been abolished, a party to entitle himself to the equitable remedy by injunction must still make such a case as would, while the distinction existed, have made an equitable cause of action. This is well settled."

In Hamilton *v.* Cummings, 1 Johnson Ch. 517, the Chancellor states, as his conclusion from the authorities, that a resort to equity to compel the cancellation of written obligations, to be sustained, must be expedient either because the instrument is liable to abuse from its negotiable nature, or because the defense, not arising upon its face, may be difficult or uncertain at law, or from some other circumstances peculiar to the case and rendering a resort to a court of equity highly proper and clear of all suspicion of any design to promote expense and litigation.

These authorities seem to establish, with great distinctness, the rule which has obtained in our courts since the practice of allowing equitable defenses in actions at law has been established, and none of the cases cited by the plaintiff at all conflict with it.

In the case of Gould *v.* Cayuga Bank, 86 N. Y. 82, it is true that the Court say that the party might have brought his action in equity to rescind the contract, and in that action might have had full relief; but in the next paragraph of the opinion the necessity of bringing in other parties is adverted to, which was to be the basis of the relief to be granted by a court of equity, and which could not be done in a court of law.

The Aberdeen Railway case, 1 Macqueen, has no application to the question now under discussion, as equitable defenses were not available in actions at law in the English courts.

Equity jurisdiction of the Court was applied in the case of McHenry *v.* Hazard, 45 N. Y. 580, because the rights of all the parties could not be determined in any one action at law, and also because the defendants could not be allowed at their election to postpone the litigation of the question, and subject the plaintiff to the vexation of a litigation at a distant period when the means of defense might be lost or impaired, and when he might be disabled

from contesting the validity of the claim with the same ability as at the present time. The latter ground for the entertaining of jurisdiction does not at all apply to the case at bar, because the plaintiff here can sue at once to recover rent, under the May agreements. The defendants have no rights to be enforced against the plaintiff, but the plaintiff, the aggrieved party, can at any time enforce the rights which they think they have. In order to test the question as to the validity of the October agreements, the plaintiff has only to bring its action for the rent due under the May agreement, and the matter is at once brought up. Equitable jurisdiction cannot be entertained in this case upon the ground that otherwise there will be a multiplicity of suits. No such result would ensue. If an action had been brought upon the May agreements for rent due since the making of the October agreements, and a final recovery had been had for the amount of rent due, according to the terms of the May agreement, that final judgment would have ended, as far as the Manhattan Co. is concerned, the October agreements as effectually as any final judgment which can be rendered in this action can do. The fact that the agreements extend over a long period of years, does not alter the question. A final recovery is just as effectual, whether it be in a court of law, or a court of equity.

Even if I, however, should find, that there was no ground for equitable relief, yet, if the facts proven showed that the party was entitled to legal relief, the bill could not be dismissed. Sternberger *v.* McGovern, 56 N. Y. 12.

But there is another ground upon which the bill in equity can be sustained, and that is, that there could be no determination as to the validity of the October agreements without the presence of the New York Co., a party to them. The New York Co. had a right to be heard upon the question. One party cannot be released by legal proceedings from a tripartite agreement, in an action against one other party. All the parties must be brought before the Court, as all have a right to be heard upon the question as to whether the agreement which is mutual shall be broken up. Therefore, the New York Co. is a necessary party to any action seeking to avoid the October agreements, that company being one of the parties to them. If an action was brought upon the lease of May 20, 1879, the New York Co. could not have been brought in as has been done in this case, and which was the reason given in Gould *v.* Cayuga County Bank, for the entertaining of a bill for recision. It seems, therefore, that the first preliminary objection is not well taken.

The second preliminary objection is, that if the October agreement is fraudulent, as the plaintiff contends, then the plaintiff itself was a party to the fraud.

The defendant claims, that as this is not a suit by a stockholder

to set aside an agreement which is chargeable with fraud, but a suit by the corporation itself—one of the parties to the fraud, a court of equity will not interfere; and we are referred to the opinion of Mr. Justice McCrary, in the case of Louis v. Meyer, 14 Federal Reporter, 312 and 313, as an authority to sustain the proposition. The case cited, however, is not analagous to the one at bar.

That action was to avoid railroad bonds in the hands of innocent holders, upon the ground that the directors had issued them fraudulently. The bondholders were innocent parties and not in any manner privy to the fraud perpetrated by the directors, and had no knowledge of such fraud. A stockholder could not maintain an action to set aside any fraudulent contract made by the corporation, without alleging a refusal, or good reason to suppose that the corporation would not bring any action. If this rule is to prevail, the directors of corporations may act as fraudulently as they please, and it is impossible to redress the wrongs which the corporation may have received at their hands, unless some stockholder is willing to undertake the labor and expense of an action therefor. Such cannot be the rule. Where directors are faithless to their trust, and have acted without any authority, the corporation may repudiate the acts so done, because the stockholders not only may claim but must claim their rights by and through the corporation, unless the corporation refuses to assert such rights. The directors are the agents of the corporation, and if they act without authority in making a contract for their principal, or fraudulently, certainly the principal may repudiate it. That it is the same principal who made the contract that seeks to repudiate it, is no bar to the relief.

The next preliminary objection is, that because the plaintiff claims that the agreement and leases of May 20, 1879, which it seeks to reinstate, were a nullity, being made without authority of law.

I understand that the claim that the agreements and leases of May 20, 1879, were void was abandoned upon the argument, it being conceded that under the statute of 1839 a corporation may lease its road.

But this is not at all necessary to answer the objection made. The plaintiff by its complaint does not seek to reinstate anything; it simply asks that the agreement of October 22, 1881, may be declared null and void; whether such judgment will reinstate anything or not is not a question involved in this action.

The next preliminary objection is, that the October agreements have never been disaffirmed by the stockholders of the Metropolitan Co. in any way, nor even by the directors, by any direct vote.

If the directors had no authority to make the October agreements without the consent of the stockholders, then certainly no expression of dissent was necessary by the stockholders, because the agree-

ments were void unless ratified by the stockholders, or confirmed by action upon the part of the stockholders, which amounted to ratification. But if it is sought to set aside these agreements because of the fraud, either actual or constructive, then the contract is a voidable one, and due diligence must be used in electing to avoid it. What constitutes due diligence necessarily depends upon the facts of each particular case. Immediately after these agreements were made, various stockholders commenced their actions to set them aside, and it is well settled, that where one stockholder is asserting by suit the rights of the stockholders as a class that it is not required that each particular stockholder should sue.

In the case of Boardman *v.* R. R. Co., 84 N. Y., it is said:

"It is not required that each particular stockholder should sue for his share of the dividends, to preclude the defendant from claiming an acquiescence and estoppel; and it is quite sufficient that they were advised of the character of the claim of the respective stockholders. The plaintiffs and other stockholders, were entirely justified in awaiting the results of the suits pending, without incurring the hazard of losing their rights on account of the lateness of their demand."

The stockholders had no power to meet and act as a body, except as the statute and the by-laws prescribe, and must be called together in the manner provided by law, otherwise they have no power to act.

In the case at bar, the only way in which the stockholders were required to act was, upon the first opportunity to appoint other agents who would assert their rights, if they had any. Moreover, the Manhattan Co., on the 9th day of December, 1881, commenced its Bill of Peace suit, and all stockholders were enjoined from suing, which injunction continued in force until February, 1883. Can the Manhattan Co. now claim laches, because no other stockholders have brought suit to set aside these agreements, when they were prevented from so doing by reason of the injunction which that company had obtained?

It is urged, that because a new board of directors has been elected, no right is given to impeach the acts of a previous board, as the corporation is the same. I am unable to appreciate the force of this objection. If my agent has entered in my name into a fraudulent agreement, I know of no reason why I may not appoint a new agent and through him repudiate the fraudulent contract. In the case supposed, I am the party acting in both instances. I have never heard that a man was bound by the fraudulent contract made by his agent in his name, because he, the same person in whose name the fraudulent contract was made, sought to set aside the contract. The directors of the corporation are its agents and executive officers. They, as such agents, manage the business and affairs of the corporation, and when the business and

affairs of the corporation are to be managed by directors, I do not think that the stockholders can do any act or make any contract, except by the use of the means provided by law, viz.: its directors. Therefore, if one set of agents act beyond their authority, or are recreant to their trust, the principal—that is, the corporation may appoint a new set of agents and through them seek redress for the wrongs which it has suffered. The corporation being able to act only through its Directors, at the very first opportunity after the October agreements were made, the shareholders of the Metropolitan Co. elected a new Board of Directors, such change in the Board being evidently made because of the fact that the old Directors had made these agreements; and within one month thereafter, this action was brought, and within one week after these agreements were executed, shareholders had commenced their actions to set them aside. I do not know how, if the most extreme diligence had been required, any more prompt action could have been taken; and thus is answered the last preliminary objection, that of laches.

We are now brought to the consideration of the four affirmative defenses, urged by the defendants. The first is:

1st.—That the Manhattan Co., had at the time of the commencement of this action already brought its action in the Supreme Court against the New York Co., the Metropolitan Co., and all the persons who had brought actions to set aside the October agreements in the nature of the old bill of quia timet, asking in its complaint that all matters relating to the October agreements should be determined in that action, and that the defendants and all others should be restrained from bringing any actions on account of the October agreements.

The commencement of this action could not in any way interfere with the rights of the Metropolitan Co. to file its bill for a rescission. The mere filing of the bill by the Manhattan Co. restrained nobody, and the plaintiffs in that action know this, because they asked for, and obtained an injunction preventing the bringing of any more suits, which was set aside by the General Term. Merely because the Manhattan Co. had filed a bill of peace against all the world in general, and the Metropolitan Co. and its stockholders in particular, the latter company did not lose any rights which it might acquire to the protection of the Court. The Metropolitan Co. had the right to file its bill for rescission, and the Manhattan Co. could not deprive it of this right by filing a bill asking the Court to adjudicate upon the question involved. Before such an action can restrain anybody's proceedings, the right to an injunction must be established, either preliminarily or by final judgment.

The second affirmative defense is:

The judgment of the Supreme Court in the action of the People

against the Manhattan Ry. Co., entered on the 17th day of November, 1881.

I have searched in vain in the judgment-roll, in the case of the People against the Manhattan Ry. Co., for anything which could in any way operate upon any rights which the Metropolitan Co. had. This company was not a party to the action and in the findings and judgment is not treated as a party. The second finding speaks of agreements made with the defendant, by certain other corporations, to wit: The New York Elevated R. R. Co., and Metropolitan Ry. Co. So also in the fifth finding, similar language is used. In the judgment, also, the New York Co. and the Metropolitan Co. are treated as strangers to the record, and they evidently were so considered by the Court. The only question at issue in that action was the solvency of the Manhattan Co.; with that issue the New York and Metropolitan companies had nothing to do. That question was one existing between the People on the one side, and the Manhattan Co. on the other, and nobody else had any interest in it. It is true that this question of solvency depended upon the October agreements, but an adjudication by the Court in that action could only affect the parties to it, and as to them only to the extent of the question involved.

But it is said that the three companies united in a petition to have the property delivered back to the Manhattan Co. The order of restoration made upon that petition in no way adjudicated upon the question of the validity of the October agreements. No such question was presented to the Court. The union of the New York Co. and the Metropolitan Co. in that petition operated only as a consent upon their part that restoration might be made. And no order that the Court did make, in that proceeding, could have had the force of an adjudication because the doctrine of res adjudicata does not apply to interlocutory judgments or orders which the Court which rendered them has power to vacate or modify at any time. The order of restoration in the People's case expressly reserved to the Court the power of alteration and modification. These companies did not become parties to the record, and as has already been shown, they were not treated by the Court in its findings and judgment, as parties whose rights were being determined. Therefore, the judgment in that action barred no rights which this plaintiff might have.

The third affirmative defense rests upon-

The judgment of the Superior Court of the City of New York entered on the 8th day of December, 1881, in the action wherein the New York Elevated R. R. Co. was plaintiff, and the Manhattan Ry. Co. and the Metropolitan Ry. Co. were defendants.

In considering this question. it is necessary that we should have

plainly before our minds the facts relating to that action and the proceedings therein.

The action was commenced upon the 2d of July, by the New York Co. against the Manhattan Co. and the Metropolitan Co., and the plaintiff claimed the right to recover possession of its property from the Manhattan Co., because of its breach of the terms of the lease between the New York and Manhattan companies, and no relief whatever is asked for, against the Metropolitan Co. The Metropolitan Co., in its answer, denies the right of the New York Co. to get back its road, and the Manhattan Co. put in a similar plea.

On the 22d day of November, 1881, the October agreements having then been made, the Manhattan Co. put in a supplemental answer, setting up the proceeding in the People's suit, and also the October agreements above mentioned, alleging them to be an adjustment of all the controversies between the parties to the action. The parties then went before the court, and without the plaintiff offering any proof whatever, the parties admitting the facts alleged in the supplemental answer of the Manhattan Co. to be true, obtain certain findings of fact and conclusions of law, all of which are expressly stated to be founded on the admissions of the parties adjudging these October agreements valid, and a judgment to the same effect is entered thereon.

I fail to see how this judgment can operate as a bar to the rights of the Metropolitan Co. to contest the validity of the October agreements. If those agreements are fraudulent, and this judgment should be held to preclude the Metropolitan Co. from rescinding them, then the law would be used for the purpose of fortifying a wrong and not for the purpose for which it was instituted, viz.: the redress of wrongs. When such a manifest injustice would result from the application of any rule of law as that a fraud would be protected, we may be sure that there is something wrong in our premises if they lead to such a conclusion, as equity and justice go hand in hand together.

If this judgment of the Superior Court is a bar to the right of this plaintiff to maintain this action, we have this state of things, as a necessary result: Directors of a company may make an agreement which is absolutely void, and in the making of which there has been a plain violation of duty, and if their corporation is sued upon it, the same Board of Directors being in office—their term not having expired—may confess judgment, and then there is no power in any court to redress the wrong. The mere statement of the proposition, it seems to me, shows that such cannot be the law, and it is not the law.

In order that a judgment may be a bar, there must be a real controversy. There was no controversy in the Superior Court. The Manhattan Co. alleged the making of the October agree-

ments, and that they adjusted all matters in difference. The New York Co. and the Metropolitan Co. say, "We agree that that is true," and the judgment is entered. This was nothing more than a judgment by consent. All the parties to the action consented that these agreements had been made and had adjusted the differences, and the Court so ordered. If these agreements were voidable for want of power in the Directors to make them, or fraudulent, then the obtaining a judgment affirming these agreements by the same directors who made them, was a fraud upon the Court, not necessarily an intentional fraud, but a fraud in law; and such a judgment binds no court and its nullity upon that ground, though it has not been set aside or reversed, may be established in another action. Webster *v.* Reid, 11 How. (U. S.) 437.

In Earl of Bandon *v.* Becher, 3 Cl. and Fin. at page 510, Lord Brougham adopts the language of Wedderburn, in the Duchess of Kingston's case, as follows:

"A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled. In order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defense, a real decision. Of all these requisites, not one takes place in the case of a fraudulent and collusive suit; there is no judge, but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant; no real interest brought into question."

In the case of Gaines *v.* Relf et al (12 How. U. S.), 472, the principle was distinctly enunciated that in order that a judgment should be a bar there must be a real controversy, and that a judgment entered by consent to be used in the future cannot affect the parties to it, because there was no controversy carried on in earnest. In that case the defendant admitted the decree, but contended—

"That said decree was designed as no honest exposition of the merits of the case, but was brought about, allowed, and consented to for the purpose of pleading the same as res adjudicata upon points in litigation not honestly contended."

The Court say:

"That this proceeding on the part of Patterson and General and Mrs. Gaines was amicable and that no earnest litigation was had, is too manifest for controversy. They agreed to go to trial at once, on the depositions found in the Probate Court, and as Patterson was to lose nothing by the event, he was, of course, indifferent as to what evidence might be introduced on the hearing.

"It also appears by his evidence that when a decree was obtained in the Circuit Court against him, his name was used to carry up an appeal to this Court, but it was in fact brought up by General and

Mrs. Gaines. Patterson employed counsel here, who, of course, had to take the record as they found it, and make the best of it they could, and it is conceded on all hands they did so, and made the best exertions for Patterson they could do, on the record brought up by him, as they supposed. Nevertheless, an affirmation of the decree was had in this Court. It could hardly be otherwise, in a case managed as this was; the object of the complainants below being, to obtain a favorable opinion and decree on the law and facts of a case made up at their own discretion."

In the case of Moser v. McDivitt, 88 N. Y., at page 68, the same principle is enunciated. The Court say:

"The judgment does not stand upon the sure footing as a judgment obtained in the usual course in a hostile suit, in which the defense of usury was either overruled or omitted to be interposed. It was a mere arrangement between the parties put by their mutual consent in the form of a judgment for the purpose of evading the statute."

It seems from the evidence in this case, that the judgment in the Superior Court was obtained for future use. Claims had then been advanced by shareholders, that these October agreements were fraudulent and void, and this judgment would appear to have been obtained by and with the consent of the very directors, whose acts were attacked in the suits by the shareholders, in order that it might be interposed as a bar to any relief to which the shareholder might show his corporation was entitled.

The denial of the motion to vacate the judgment before Mr. Justice Freedman, gave such judgment no greater force or effect than it had before. It left the judgment in precisely the same position that it was before, with the same force it before had and no more. Schrauth v. The Dry Dock Savings Bank, 86 N. Y. 395.

The judgment, therefore, of the Superior Court does not operate in any way as a bar to the assertion of its rights by the Metropolitan Co. in this action.

The fourth and last affirmative defense is that restitution cannot be had.

It is claimed, that because, by any judgment in this case, the Receivers cannot be put again in possession of the property of the Manhattan Co.;

That because the People's suit in the Supreme Court cannot be restored to the condition in which it then stood;

That because we cannot restore the bondholders' suit to the position it then was, with its injunction;

That because the Superior Court suit cannot be restored to the condition it would have occupied had not so much time been lost—that, therefore, no rescission can be had.

It is urged that we would have to undo the "increase of Manhat-

tan stock. That it has been proved that this stock has been increased with the sanction of the State Engineer and Surveyor, pursuant to law, from thirteen millions to twenty-six millions of dollars. What can we do with that? Shall we reduce it? What will we do with the stockholders who hold it? Shall they be paid, or will we take their stock away without payment? Then we would have to re-exchange the first preferred stock for New York stock, and the second preferred stock for Metropolitan stock. How is that to be done? Then we would have to dismiss the Burnham suit, and the quia timet suit, and the merger suit; enter an order denying the New York application in the People's suit, take an appeal from the order; put it on the calendar of the General Term for argument; pay back the interest which the Manhattan Co. had paid on the mortgage bond of the other two companies; make a question of the insolvency of the Manhattan Co.; restore to the other two companies their earnings since October, 1881; in short undo everything that has been done since October 22d, 1881, pursuant to the settlement. But that is impossible. The New York Co. cannot be restored to the condition it then held. It parted with its whole earnings, and if they could be ascertained and received back, there is no corporation or person to pay them; a portion of them have been paid over to the Metropolitan Co. and distributed to its bondholders and stockholders; they are not parties to any pending suit, and, if they were, they are under no obligation to pay back. Each company has been released from the six and a half million claim; that release must be cancelled, but it cannot be cancelled without imperilling the interests of the stockholders of the constituent companies."

Certainly, if all these things are to be done, as a condition of relief, then the plaintiff in this action is remediless, because it would be impossible for the plaintiff to comply with such a judgment.

But I do not understand the rule to be, that a plaintiff is deprived of all relief, because he cannot restore the other parties to the same position which they occupied before they entered into the void or voidable agreements, when the other parties to the agreement have put themselves in the position in which they find themselves, with full knowledge than the other party claims the agreement to be void and fraudulent, and every means had been taken at once by those who have the right to question the legality of the proceedings, to restrain the wrong.

Long before any of these things were done, in respect to which restoration may now be impossible, suits had been brought by more than one stockholder seeking to avoid the October agreements, and indeed the first suit was begun within one week after the agreements had been made, by a stockholder to annul them and to have them declared void. These suits multiplied so rapidly that as early

as December 9, 1881, the Manhattan Co. filed its bill of peace, for the purpose of restraining the increase of this cloud of suits, with which it was threatened by stockholders of the Metropolitan Co. The Metropolitan Co. could commence no action itself, because it was in the hands of the very directors who, it was claimed, had either exceeded their powers or acted fraudulently in fact or in law in the making of these agreements; and the stockholders, therefore, necessarily were required to assert their own rights. If, in the face of all these facts, the other parties to the agreement went on and acted in such a way that they cannot get back to the position which they occupied at the time of the making of the alleged fraudulent agreements, it certainly is not the fault of the plaintiff or of the Court. They have only themselves to blame. Their heedlessness cannot deprive the plaintiff of any rights to which it otherwise would be entitled. If this is not the rule, then all that a party has to do, who has procured the execution of an agreement by fraud, even after the fraud has been discovered and the party defrauded has informed him that as soon as possible an action for rescission will be begun, to defeat such an action, is to hasten and put himself in such a position that his steps cannot be retraced. I do not understand this to be the rule. Where, however, a party has, without any knowledge of any intention to rescind and for no ulterior purpose acted upon the faith of the agreement, and has lost rights thereby, and such rights cannot be restored, the injured party can obtain no relief except such imperfect reparation as his action at law, to recover the damages occasioned by the fraudulent deceit will afford. The Court would, however, compel the plaintiff to do every thing that lay in its power to restore the then statu quo.

As to the People's suit, I do not know that the Manhattan Co. is in any respect harmed by the discontinuance of a suit brought against it on account of insolvency, nor is it injured in any degree by not being in the possession of receivers.

As to the bondholders' suit, it was not discontinued because of the October agreements; the discontinuance having taken place October 6th, more than two weeks before the agreements were made.

As to the Superior Court suit, the judgment and findings can be vacated, the injunction restored and then the action will be in the same condition in which it was at the time of the October agreements.

With the increase of the capital stock of the Manhattan Co. and the result flowing therefrom, this plaintiff has nothing to do; all those things were done by the defendants with full knowledge of the claim presented in this action, and they acted at their peril.

As to the payment back of the moneys which have been re-

ceived. Before disposing of that part of the question, it will be necessary to examine a few of the authorities upon this question of rescission.

The principles upon which rescission must proceed, are laid down with great distinctness in the case of Gould against the The Cayuga County Bank, 63 N. Y. 79. The Court holds that "one who seeks to rescind a compromise of a disputed claim, upon the ground of fraud, must promptly upon the discovery of the fraud restore or offer to restore to the other party whatever he has received by virtue of it, if any, in full; the tender must be without qualifications or conditions."

The Court makes a distinction in this case, which should be borne in mind, between a suit in equity to rescind, and a suit at law upon a rescission, holding, that if you sue at law you must offer to restore before you bring suit; if you sue in equity you may make the offer in your complaint. The defrauded party has ample remedies. One situated like the plaintiff was in that case, can rescind by tendering or restoring what he has received, and then commencing his action; he may keep what he has received, and sue to recover damages for the fraud; or he may commence an action to rescind or for equitable relief, and offer to restore, in case he is not entitled to retain what he has received. If, however, the plaintiff cannot restore absolutely, he cannot come into a Court of Equity for relief. This rule is illustrated by the learned Court, in its opinion, by the following:

"Suppose A goes abroad, leaving in the hands of his agents debts, to be collected against various debtors, among whom is B, a debtor for $1000, and before his return his agent dies. Upon his return he finds among his papers no evidence that B paid his agent and then he calls upon B and he claims that he paid the whole debt. A disputes this, and they finally agree to compromise the dispute, B paying $500. Afterward A concludes that B did not, in fact, pay his agent, and claims that he was induced by fraud to enter into the compromise. So long as the compromise remains in force, no action, based upon the original indebtedness, can be maintained. The bar can be removed only by rescinding the compromise agreement, and that can be rescinded only by a restoration of the $500, so that they can resume their dispute upon a footing of equality, just where they left it before they entered into the compromise. When A sues upon the original indebtedness, B must be permitted to renew his dispute, and set up payment of the entire debt to A's agent. If he can establish that, the $500 will be again in his hands, where it belongs. If he fails, A will recover his whole debt. If A can maintain his suit without first returning the $500, he will have all the game in his own hands. If he wins the suit he will retain the $500 and get $500 more. If he loses the suit, in consequence of proof that the whole debt has been paid

to his agent, he will still have the $500. He will thus, in effect, hold B to the compromise, but himself be released. Such inequality and injustice cannot be tolerated by correct principles of law."

It is plainly stated in the above case that the reason why restoration is made a condition of rescission is that the retaining of that which has been received is inconsistent with the abrogation of the contract.

But the rule that if any party to the agreement has done anything which cannot be undone, or has omitted to do anything which he might have done, no rescission can be had, does not apply to things done or left undone by such party to the agreement, who has knowledge before anything is done or omitted to be done, that the agreement is repudiated either by the other party or by those who have a right to contest its validity on his behalf.

It is claimed that as a condition of rescission, all the moneys paid out since October 22d, 1881, by the Manhattan Co., both to the bondholders and shareholders of the New York Co., must be restored; that the New York Co. cannot be restored to the condition it then held; that it has parted with its whole earnings and they cannot be got together again and paid back; they have been paid out and distributed to bondholders and shareholders who are not parties to this action, and if they were they are under no obligation to pay back.

As far as the distribution of the earnings of the New York Co. by the Manhattan Co. is concerned, such distribution was not only permitted but connived at by the New York Co.—they well knowing of the claim that was made by the Metropolitan shareholders, that the October agreements were void or voidable, and that they would not be accepted by the stockholders of the latter company.

I say that the distribution of its earnings was connived at by the New York Co., because, with the full knowledge above stated, they consented to the dismissal of the action in the Superior Court and to the entry of a judgment in that Court affirming the validity of the October agreements. They did all those things, not in ignorance, but with full knowledge of every claim which has ever been advanced affecting the validity of these agreements. Therefore, if they have empowered the Manhattan Co. to distribute their earnings, and they cannot now get them back, it has not been done in reliance upon anything which the plaintiff has done—in ignorance that there was any claim of wrong affecting the validity of those agreements. They knowingly took the risk of the success of the attacks upon these agreements, and they cannot now complain if they have lost the battle.

Upon the question of the restoration of the money received by the Metropolitan Co., it will be necessary to advert again to the rule governing restoration upon rescission.

The rule is very distinctly laid down, that to retain any part of

what has been received upon a contract is incompatible with its rescission. Cobb *v.* Hatfield, 46 N. Y., at page 537.

To retain the whole, or a part, only, of what has been received upon the contract, is incompatible with its rescission, and hence the necessity of restoring what has been received upon it. Mason *v.* Bovet, 1 Denio, at page 741.

The same rule was held in the case of Gould *v.* Cayuga County Bank, supra.

In all these cases, however, there was but one contract, and the right to retain the money received depended entirely upon the contract which it was sought to avoid, and, therefore, its retention was incompatible with its rescission. But this rule does not apply where, if the contract sought to be rescinded had never been made, the plaintiff would have been entitled to receive more than the payments made under the said contract. In such a case no offer to return is necessary, not is it proper for the Court to order restitution. This principle was distinctly held in the case of Allerton *v.* Allerton, 50 N. Y. 670. In that case, the complaint alleged that plaintiffs' defendant and one McPherson were partners in conducting certain stockyards at Pittsburg, Pennsylvania; that plaintiffs, induced by the fraudulent representation of defendant (who had the management of the business), that the business was not profitable, and that he, in conjunction with them, would sell out to McPherson, consented to unite with him in such sale upon being refunded the amount invested by them, and that thereafter the defendant represented that he had sold out, and paid to plaintiffs the money advanced by them; that in fact defendant did not sell, but retained his interest and subsequently acquired McPherson's interest; that the business had been profitable, and defendant had received large gains and profits. Plaintiffs asked that the sale be declared void, that defendant account for all moneys received by him, and that they have judgment for their portion of the profits under the copartnership agreement, less the amount they had received. The case was tried by the Court, who found the fraud as alleged, and decided that the plaintiff was entitled to the share of the profits which they could have originally claimed, less the amount received by them on the sale; and that the defendants execute a retransfer to plaintiff of the interest they had prior to the sale. Judgment was entered upon the decision, which was reversed by the General Term upon the ground that no fraud was shown; that McPherson or his representatives should have been joined as defendants, and that the plaintiffs should have tendered back the sums received by them on the sale. The Court of Appeals reversed the judgment of the General Term, and affirmed that of the Special Term, holding that the fraud alleged was established; that no tender of the amount received was necessary before suit brought, as the judgment sought for and given, allowed it to the defendant,

and this was, in fact, an actual return of the consideration paid; that the question as to misjoinder or non-joinder of parties, not having been raised by the pleadings or upon the trial, could not be raised upon appeal. The principle contended for was clearly applied in the above case.

If the plaintiff is entitled to recover the money of the defendant, contract rescinded or not, no tender or offer to return is necessary. It is only where the plaintiff has no claim to the money received, except by force of the rescinded contract, and, therefore, its retention is incompatible with the rescission, that a return or offer to return is deemed to be necessary.

I am of the opinion, therefore, that there are no obstacles which prevent the plaintiff from making all the restitution which the law requires in case it has been shown that the plaintiff is entitled to relief in this action.

It is now necessary to consider the grounds upon which the plaintiff claims relief.

The questions of law involved are of the greatest importance to the community at large, to the innumerable trading corporations with which our country is filled, and to such of our citizens as hold the shares of stock of such corporations. The respective rights, duties and obligations of both directors and shareholders in these corporations must be determined, unaided by any authoritative adjudications in our own State upon the subject.

Before, however, considering the legal questions presented, I shall endeavor to dispose of the only question of fact presented by the evidence, which bears, in any degree, upon the right of the plaintiff to relief; and that is:

Was there any actual fraud upon the part of the Metropolitan directors; and did they enter into a scheme to benefit themselves at the expense of their corporation?

Upon the evidence in this case, I am clearly of the opinion that no charge of fraud can be sustained. In view of the elaborate arguments which have been advanced by the counsel for the plaintiff in this case, in support of an affirmative answer to this question, and their evident belief that they have established their right to such answer, it is necessary that I should consider the various points raised by them, somewhat in detail.

Upon an examination of the evidence in this case, and the arguments of counsel thereon, I have had forced upon my mind the conclusion, that their belief in the verity of their position was brought about by asking themselves the question:

"Can any good thing come out of Nazareth?" by imputing bad motives when the moving cause may have been good; by considering past transactions by the light and knowledge which subsequent events have developed; by taking that view of the future of these properties, whether supported most strongly by the evidence or

not, which best accords with their desires, rather than by according to the defendants the right of a different judgment which they might in good faith entertain, than by placing themselves in the position of the defendants with no knowledge of the future, than by imputing good motives and meeting the question with the idea that the Directors of the Metropolitan Co. intended to do their duty by that corporation.

Let us review, for a moment, the situation of affairs during the spring, summer and fall of 1881, and see what diffiulties had to be overcome and what obstacles removed in order that the elevated railroad system, that these properties should be relieved from the incubus and dangers of this receivership (an invention of the Courts in modern times, by which the enforcement of vested rights, rights secured by contract and by law, are arbitrarily and indefinitely stayed). It was soon ascertained, after the execution of the leases and tripartite agreements, that great miscalculations had been made as to the cost of completing the various lines, and that the net income derived from the business of the roads would fall far below the sanguine anticipations of the parties interested; and that the properties of these corporations were subject to taxation to an extent which had not at all entered into the calculations fixing the rental which should be paid, to say nothing of the dangers which were threatened, in view of the decision of the Court of Appeals, that the owners of private property had some rights which even these corporations were bound to respect. The cost of the completing of the Metropolitan structure absorbed over four millions more of money than had been anticipated. The cost of operating these roads had greatly increased, and the amount of travel, especially upon the Metropolitan system, fell far below what had been anticipated. (I am aware the plaintiff claims that unjust discriminations had been made against the Metropolitan Co. These, however, I will consider later.) And taxation to a very large amount had been levied upon the property of these companies. That the dangers which subsequently overwhelmed the Manhattan company and certainly threatened the interests of the holders of the stock of the Metropolitan Co., were foreseen and deemed inevitable long before the final catastrophe, seems to me to be evidenced very strongly by the fact, that as early as the spring of 1880, the necessity of a complete consolidation of all interests in those properties was keenly felt by the then Directors and managers of both the New York and Metropolitan companies, and led to the efforts to bring about such consolidation, which seem to have been defeated because of the greatly divergent views of the owners of the various properties as to their value, even after a commission of their own choosing had, after hearing both parties, fixed the equitable basis upon which such consolidation should be founded. It was the object, undoubtedly, of those urging the consolidation to fix the union of

the elevated railroad system beyond a doubt, feeling, as they did, that united they could stand, but that divided it might be a much more difficult task. They anticipated the uncertainty, confusion and danger to union which must necessarily arise in the event of the Manhattan Co. being unable to comply with the leases, which event they plainly saw foreshadowed. But, for the reason above stated, no merger of interest could be agreed upon, and events were allowed to take their course.

In April, 1881, the President of the Manhattan Co. confessed the hopeless condition of the Manhattan Co., unless relieved from the load of taxation. The Attorney-General thereupon commenced his first action the latter part of May for the dissolution of the corporation and the appointment of a Receiver. This was long before there was any idea advanced of Mr. Gould becoming a director of the Metropolitan Co. In July the Manhattan Co. was unable to pay the interest on the bonds of New York and Metropolitan companies falling due on the first, as well as the rental then due. Some friends of the companies advanced the moneys requisite to pay the interest on the bonds. Shortly prior to this time, Mr. Kneeland, a holder of a considerable amount of Metropolitan stock, and also a number of the proxies of Metropolitan shareholders, went to Mr. Sage to ask him about making up a Board of Directors, and it was suggested that it would be desirable to get Mr. Gould into the Board; and Mr. Kneeland asked Mr. Gould to become a member of the board, and he finally consented to do so, if certain of his friends would also consent to go into the Direction. There is not a scintilla of evidence that Mr. Gould desired to get into the Board of Directors of the Metropolitan Co., that he made the slightest effort to get into that Board, but on the contrary the evidence shows that he placed conditions upon his going into that Board, which Mr. Kneeland, who was to elect him, refused to accept, and which he did not accept until almost the very day of election; and yet I am asked to find, that as early as May Mr. Gould had formed the plan of ruining Metropolitan to build up the Manhattan, and that in furtherance of that plan he caused the Attorney-General's action to be brought, and the bondholders' action against the Metropolitan Co., Mr. Lawrence, the attorney for the bondholder, being a friend of Mr. Connor, who was a partner of Mr. Gould.

It is further urged that as an evidence of the fraudulent intent of Mr. Gould, that he insisted upon having certain of his friends go into the Direction with him. May I ask, is there any crime in this? Mr. Gould's presence in the Board was desired, either because of his financial and executive ability, or because his appearance in the Board of Directors would add strength to the management of the corporation. It is true that Mr. Gould says that he did not expect, when he went in, to give much attention to its

business, but if his presence was considered so desirable, he had the right to say who his associates should be. If his presence was not wanted with this condition, then why did Mr. Kneeland consent to his terms? Can there be any impropriety, under such circumstances, of a man protecting himself from factious opposition, or from being overwhelmed by expedients worse than useless?

I am unable to see any unfavorable deduction to be derived from this feature of the case. Indeed, one of the badges of fraud urged by one of the learned counsel for the plaintiff is that although Mr. Gould is notorious for sustaining properties in which he is interested with his means and exertions he did not advance a dollar, or take any action to preserve the leases, and to maintain the Metropolitan Co. in its then condition. That is, because Mr. Gould did not advance his own money to support the Metropolitan Co., although he may honestly have believed that the charges reserved in the leases could not be earned for years to come, he is to be charged with fraud! There is no rule of law which requires a director to use his own money to support a corporation in which he is a director. In fact a use of his money by a director for such a purpose puts him in a very different position from an ordinary creditor. In case of disaster he is liable to much greater hindrances in the collection of his debt, and means of protection of which the ordinary creditor can avail himself are closed to the director who has advanced his money to support the corporation. If Mr. Gould is notorious for sustaining properties in which he is interested, as counsel say, then if he did not at once step to the relief of the Metropolitan Co. we must necessarily conclude that he fully realized the hopelessness of the task under the then existing arrangements.

On the 30th day of June, Mr. Kneeland made his liberal proposition to the directors of the Manhattan Co., that if the Board of Directors of the Manhattan Co. would surrender the control of that corporation to him and his associates that they would take one million of the income bonds of the Manhattan Co. at sixty cents on the dollar. If it was such an evidence of guilt in Mr. Gould requiring the presence of his friends in the Metropolitan board as a condition of his acting as a director, what are we to think of Mr. Kneeland's proposition to take possession of the Manhattan Co. and lend it $600.000 upon a promise to pay back $1,000,000 with interest out of its income? That Mr. Gould had anything to do with the rejection of this proposition, or even knew of it, there is not the slightest evidence. He was not then a director in either of the companies, nor did he own any stock in either.

But, suppose he had been a director in the Metropolitan and Manhattan companies, and had held stock in the Manhattan, and he had come forward and said: I will take these bonds at sixty, would there be any doubt but that such a ruinous transaction would have

been at once impeached, and the first to cry fraud would have been these very Metropolitan stockholders who now claim that Mr. Gould was guilty of fraud because he did not advance his money to support the Metropolitan Co.? The acceptance of such a proposition by the directors of the Manhattan Co., the borrowing of money at such ruinous rates, and upon such conditions, would be justifiable only if it could be made to appear that by no other means could the peril be warded off, and that it was thereby successfully averted. But, in fact, the sum of $600,000 would have put off the evil day but little, if any more than six months, and shortly after the first of the next January, the Manhattan Co. would have found itself again confronted by its creditors with no money to pay their claims, and four hundred thousand dollars deeper in debt than it was before.

On the 2d of July, the Attorney-General had commenced the second action, and on the 13th of July, the receivers were appointed, of the Manhattan Co., and the New York Co. had commenced its action in the Superior Court to get possession of its road, upon the ground of the insolvency of the Manhattan Co. The New York Co. also, on the 22d of July, presented its petition to the Court in the second People's suit, setting forth the hopeless insolvency of the Manhattan Co.and asking that the Court give it back its property. In August,the $13,000,000 claim was started. Judge Emott, an eminent lawyer of this bar, had given it as his opinion, that the Manhattan Co. had a valid claim against the New York and Metropolitan companies. In this view, Messrs. Allison & Shaw concurred; and Mr. Justice Westbrook intimated subsequently, that it was not to be brushed away without thought.

On September 1st Mr. John C. Watson, of Boston, a stockholder of the Manhattan Co., commenced his action in the U. S. Circuit Court against the New York and Metropolitan companies, for the purpose of testing this claim. The adviser of Mr. Watson, in this city, was Mr. Ashley, secretary and transfer agent of the Wabash, St. Louis & Pacific Ry. Co., of which Mr. Gould was a director. When Mr. Ashley was in the banking business here, Mr. Watson had been his Boston correspondent. Mr. Watson wrote to him asking him what to do. Mr. Ashley consulted his son and a Mr. Wheeler, lawyers, and then he advised Mr. Watson to bring suit. Mr. Ashley states he never spoke to Mr. Gould on this subject until after this suit was brought, when he simply showed him the complaint in the cars; that Mr. Gould had no connection with the action in any manner, way or shape; and yet it is claimed in the face of this evidence, given by an unimpeached witness, whose manner of testifying gave every evidence of honesty, that Mr. Watson's suit was one of the schemes of Mr. Gould to cover up his design to ruin the Metropolitan Co. The time was now drawing near when the ninety-day forfeiture clause in the leases would

become operative, and the directors of the Manhattan Co. feared to allow a forfeiture to attach, lest the leases would be broken and the New York Co. get its property back. Accordingly, the device of receivers' certificates was resorted to in order to bridge over the difficulty, and the receivers made an application to the Court to be allowed to issue receivers' certificates bearing twelve per cent interest; and these certificates were, as I understand it, expected to be a first lien upon the properties held by the Manhattan Co. (This kind of certificate is another of those modern improvements in reference to the administration of the affairs of an insolvent corporation, by which the first lien given by his contract to a creditor loaning his money to a corporation, is made by the Court subordinate to a subsequent creditor. I suppose the courts which grant such extraordinary relief look upon them as a sort of bottomry bond, the proceeds of which are to be devoted to keeping the sinking corporation afloat until it can be piloted by means of the operation of the Court's stay law under the guise of a receiver, into a safe harbor.)

Mr. Gould, Mr. Sage, and Mr. Connor made affidavits opposing the application, upon the ground that it would be only a temporary expedient, and serve simply to prolong for a little while a hopeless struggle. In this opposition they were clearly right, as shown by subsequent events. The difficulties under which the Manhattan Co. labored were not of a temporary nature; they were radical and could not be overcome by any temporary expedients. The revenues of the elevated railways have never, up to this time, yielded enough to pay the enormous burdens which the Manhattan Co. had assumed by the leases and tripartite agreement of May 20, 1879; and when they will, depends upon the development of the earning capacity of the Metropolitan roads in the future, as the Third avenue road of the New York system has about reached the limit of its capacity.

To this point I shall again revert.

If the roads had been kept in the hands of the receivers and forfeiture prevented by the issuing of these bottomry bonds, one upon the other, the end would inevitably have been, that although the bondholders would have received their interest and the stockholders their dividends, and thus a forfeiture averted, eventually the holders of the bottomry bonds would have owned the whole property, and the bondholders and stockholders would have had no interest therein. I can see no fraud in preventing such financiering. The Court wisely refused to give its sanction to such a violation of vested rights, and simply authorized the receivers to borrow money upon certificates at legal rates, and none of the certificates were negotiated.

In the mean time the motion of the New York Co. to get back its road, made in the People's suit, was argued, and on the 30th of

September, the ninety days' grace having elapsed, the New York Co. presented a supplemental petition, setting up the forfeiture, to reinforce its demand for its property. Negotiations for a settlement had been begun some time before, and Mr. Gould now began to purchase Manhattan stock, and also bought his Metropolitan and New York stock. About October 1st the necessity of a settlement upon some basis seems to have been generally conceded. It was apparent that some solution would be arrived at by which the Manhattan Co. could remain in possession of the property. Negotiations were carried on; conference committees appointed; that some concessions must necessarily be made was obvious, to what extent, and in what order, were the only subjects of discussion. The old controversy as to the relative values of the New York and Metropolitan properties were renewed: the $13,000,000 suit was held up in terrorem. (It may be doubtful whether anybody was very much frightened by it.) And finally the rentals were reduced to six per cent, with a preference to the New York Co.; and this contract was not submitted to the stockholders of the Metropolitan Co. Mr. Gould had, at this time, purchased twenty thousand shares of Manhattan, and held twenty-five hundred shares of the Metropolitan, and five thousand shares of New York.

If the New York Co. was presenting itself before the Court, I might understand how such a settlement might be considered disadvantageous to it; and the fact that not only the board of directors but the stockholders of that company approved this settlement, seems to be conclusive evidence that at that time the settlement was deemed wise and proper by all unprejudiced minds.

But it may be said that this result was brought about by the fact that the New York Co. was to have a preference in the payment of dividends. That the New York Co. should have such a preference was inevitable. There is not the slightest doubt that if at any time there was a deficiency in dividends, it would arise from the fact that the Metropolitan roads did not earn them; and further, that the New York Co. would earn much more than sufficient to pay the rental dividends upon its lease, long before the Metropolitan Co. could possibly hope to earn rental dividends upon its lease.

I am aware of the fact that these conclusions are disputed by the plaintiff; but it seems to me very plain that the plaintiff's deductions are based upon a greatly exaggerated view of the immediate future of the Metropolitan roads.

It is undoubtedly true that the Metropolitan roads might be run so as to show greater gross earnings; but that such a change in the running of the trains would result in an increase in the net earnings of the roads, is, in my judgment, far from being established. The idea of running heavy surface engines and trains over the Second avenue line to Twenty-third street, even if the structure

would permit, is too conjectural to need much comment. This structure, in consequence of its great height, is inaccessible, and the only reason which will cause its earnings to be increased to any extent, is the fact that the Third avenue road cannot accommodate any more travel.

Again, the Sixth avenue road cannot be as profitable as the Third. From Fifty-ninth street up to the terminus at the Harlem river, it runs through a sparsely settled portion of the city, and it is compelled to run each train a much greater distance than the Third avenue is required, and this has increased the cost of transportation of its passengers. Below Fifty-third street this road has also nearly reached its limit of accommodation, and the result of an increase of travel above Fifty-ninth street would be to deprive it of local travel below Fifty-third street, and consequently the cost of transportation of its passengers would be increased in proportion to the greater distance each passenger travels.

For these reasons, it does not seem to me that the future of the Metropolitan properties is nearly so brilliant as its stockholders imagine, and that its net earnings will not for years, if ever, equal those of the New York Co. Therefore, as far as the preference given to the New York road is concerned, no unjust discrimination was observed.

It may be said that Mr. Field, who was also interested in the Manhattan Co., carried this settlement through the New York board. He undoubtedly urged it; but that the other directors were under his influence, or that they subserved any other purpose than the interest of their company is not by any means shown, but upon the contrary, the evidence shows that the proposition was vigorously canvassed and finally approved as the best solution of existing controversies, by men unbiased by any adverse interest.

Much has been said about that bugbear of the $13,000,000 claim. This claim may have no foundation; it may be frivolous. As to this, I do not express any opinion, but respectable counsel had given it their sanction and it was a good thing to get it out of the way. It might have given trouble when least expected, and that it had no foundation in law, in the opinion of the eminent counsel for the plaintiff, does not alter the fact, that it was very desirable to dispose of it, if possible.

I have had brought under my notice a case which illustrates how dangerous it is to leave outstanding a claim which is declared without foundation by the most eminent counsel.

Not very many years ago, a suit was to be begun to have actual partition of certain real estate in this city, amongst the numerous tenants in common. It being a very important action, and as it would involve the title to a very large and valuable property, the most eminent counsel then at the New York bar was retained to supervise the proceeding. During the preparation of the complaint,

a question arose as to whether it would not be desirable to make a person, who had been appointed an assignee in bankruptcy in 1841 of a party through whom an interest in the property descended, a party to save all question. The attorneys favored it, although they were of the opinion that such assignee had no interest, upon the ground that it was best to make any or every body a party in a partition suit who not only could have or by the slightest possibility could claim to have, any interest; the eminent counsel examined the question and was firmly convinced that any claim by the assignee would be of the most frivolous character, and the attorneys pressing the view that it was best anyhow to make this assignee a party, to save all question, the eminent counsel declared that he would retire from the case if any such unnecessary parties were made defendants. The assignee in bankruptcy was not made a party. The action went on, the property was partitioned, a large amount of it sold, title taken, upon the eminent counsel's opinion as to the regularity of the proceedings. Some time afterwards the Court of Appeals decided that by the assignment in bankruptcy in 1841, the whole title to that share in the real estate, claimed through the bankrupt had passed to the assignee, and, as a result, the title to the whole of the property partitioned was defective. I, therefore, say that no matter what any lawyer's opinion may be as to the invalidity of a claim of the character of the $13,000,000 claim, no matter how frivolous in the opinion of some it may be, it is no evidence of fraud that its existence was recognized in this settlement.

That this claim, of itself, was the moving cause of the reduction in the rentals to be paid to the companies by the Manhattan cannot, I think, with verity be asserted; or that it was a very potent factor in determining the terms of the new arrangement, but that it was thought advisable to get rid of this claim and that it was taken into consideration with the many other things necessary to a determination as to the advisability of any particular action, is undoubtedly true.

The necessity of keeping the properties under the control of one management was recognized, and that the Manhattan afforded the best means of attaining that end was acknowledged, and how this result could be achieved without the dangers of the disastrous failure which had followed the making the leases of May 20th, 1879, was the problem to be solved. It was solved by the October agreements to the satisfaction of the directors and stockholders of the New York Co., none of whom, except one, had any interest whatever in the Manhattan Co.—the New York Co. being called upon, in my judgment, to make much greater sacrifices than were called for from the Metropolitan Co.

At the time the October settlement was made by the terms of the lease of May 20th, 1879, the New York Co. was absolutely entitled to the possession of its road. There is not a pretense that

there was any defense to its claim; and yet it is urged that it was the duty of the directors of the Manhattan and Metropolitan companies to resist this claim, and, because they admitted its validity and negotiated upon that basis, they are guilty of fraud.

The counsel say:

"The New York Co. would have been powerless, for many months, to break up the lease, because of their non-payment.

"At the expiration of the ninety days' grace provided by the original lease, the New York Co. would have to bring an action of ejectment to obtain possession of the road.

"That suit with the two trials given as a matter of right to the Manhattan Co. by the statute, would have lasted months, if not years, and would have given the lessee ample opportunity to provide for its liabilities by its rapidly increasing earnings, to say nothing of raising the necessary funds in other ways."

That is, by putting in defenses under oath having no foundation in fact, taking new trials and paying the costs of a previous trial with the absolute assurance of a no better result, the New York Co. might have been delayed in the assertion of its rights for months, if not for years, so as to have given the Manhattan Co. time out of increased earnings to pay its past indebtedness; and because the Directors of the Manhattan and Metropolitan companies did not resort to these (I had almost said questionable, but there is no question as to their impropriety) devices that, therefore, they are to be charged with the betrayal of their trusts. It is the first time, I imagine, that a Court of Equity has ever been asked to give its sanction to such a claim as this.

Indeed, if the Directors of the Manhattan and Metropolitan companies had taken this course and incurred expenses in such litigation and paid costs upon the obtaining of such new trials, and these expenses and costs had been paid out of the funds of the respective companies, they could have been charged personally against such Directors as disbursements incurred in proceedings which they had carried on in bad faith, in violation of their duty. It is no duty of a Director to resist lawful claims against his corporation, and if legal forms are susceptible of abuse by the unscrupulous, a Director is not censurable for not availing himself of such improper methods to sustain his corporation.

The conduct of the Metropolitan Directors, after the making of the October agreements, is claimed to be strong evidence of the frandulent intent and bad faith with which these agreements were made. That the procuring of the judgment in the People's suit and also in the action in the Superior Court, the adoption of the merger agreement of November 14, and its terms, and the manner in which dividends were declared, was an attempt to use the forms of law to coerce the stockholders of the Metropolitan and New York companies into a ratification of the merger agreement, is to

my mind certainly apparent, but these facts are not sufficient to establish an original fraudulent intent.

In order that a fraudulent intent in the original act may be deduced from subsequent acts, they must be inconsistent with anything but a fraudulent intent originally, and not relate to any subsequent fraudulent intent, because a fraudulent intent formed after an agreement has been executed and delivered, although formed for the purpose of aiding the carrying into effect the terms of the agreement, cannot relate back to the original agreement.

Great opposition to the October and November agreements had been manifested by some of the stockholders and the endeavor was made to crush out this opposition, but these efforts by no means implied that any improper purpose was indulged in at the time of the making of the agreements themselves.

The absence of Mr. Connor, and the non-production of the books, are to my mind a very suspicious circumstance; and were it not for the rule laid down in Bleecker *v.* Johnston, 69 N. Y. 309, I should necessarily conclude that their absence justified the strongest inference to be indulged in against the defendants. But as this rule is held by the Court, in that case, only to apply to cases where it is shown that a party has resorted to improper means to get or keep witnesses away from the trial my own opinion must conform. Although we may imagine a great many things in connection with this matter, yet unless our deductions are supported by some evidence, they cannot form the foundation of a legal judgment.

There are other minor points which have been urged by counsel upon this question; but this opinion has already grown to such an inordinate length, that I am warned to take up no more time or space in the discussion of this point.

The next question to be considered is—

Had the Metropolitan Directors the power to modify the original leases and tripartite agreement of May 20th, 1879, without the consent of the shareholders?

In the disposition of this important question, I am but little aided by any of the authorities in the Courts of this State, or of the United States.

It is true, that Mr. Justice Blatchford, in the U. S. Circuit Court, in the case of Flagg, held that these October agreements were valid, upon the authority of Hoyt *v.* Thompson, ex'r, 19 N. Y. 207, and McCullough *v.* Moss, 5 Denio, 566; and that the General Term of this Department sustained the same in the case of Content, upon the ground that the October agreements were nothing more than a compromise and adjustment of claims which the Metropolitan and New York companies held against the Manhattan, and that the Boards of Directors having charge of the management of the affairs of a corporation, can always exercise this power

of adjustment in the administration of the affairs of their corporation. The weight to be given to the decision by Mr. Justice Blatchford has been much shaken by opinions given in our own Courts; and the ground upon which the decision of the Content case was based does not seem to be relied upon by the counsel for the defendants in the case at bar, although the case is presented as an authority in their favor. If the October agreements are to be held to be simply as a compromise and adjustment of an existing claim, then I am clearly of the opinion that the Board of Directors of the Metropolitan Co., without the assent of its stockholders had the power to make them, within the principle involved in the case of Hoyt *v.* Thompson, 19 N. Y. 207. But, in my opinion, these agreements are not susceptible of any such limitation. They are rather new agreements radically modifying and changing previous agreements, which, for the purposes of the discussion in the present view, it must be conceded the Directors of the Metropolitan Co. had no power to make without the consent of the shareholders, and as to all the terms and provisions of which such shareholders had been consulted, and to which they had given their assent. It appears to necessarily follow, that, if the directors have no power to lease without the assent of the shareholders, such shareholders might determine the terms and conditions of the lease to be given. If their consent is necessary, it must be because they are to be consulted as to the advisability and desirability of leasing their property, and that question depends almost always upon the terms and conditions of the lease proposed. Therefore, how can they intelligibly act unless they know what is to be done? They might give their assent to a lease upon certain terms and refuse it upon other conditions. The stockholders could, if they chose, give a power to lease to their directors, leaving the latter to determine the terms and conditions; but that was not done in respect to the agreements and leases of May 20, 1879. The stockholders approved of these instruments after they were executed and after they had been read and considered. They consented to lease upon those terms and no other, and to say, that if the Board of Directors had no original power to lease they could whenever they thought the exigency or the situation required, radically change and alter the terms and conditions of a lease granted by authority of shareholders, would be to deprive the shareholders of intelligent action.

If these agreements had merely been a settlement of existing claims due, or about speedily to become due, they might be considered as mere compromise agreements, but when they change in many substantial particulars the leases of May 20, 1879, and that, too, for a period of over nine hundred years, I cannot see how they can be called mere compromise agreements.

But it is urged, "that, conceding the fact that shareholders

have a voice as to the transaction of extraordinary business, the extraordinary business of leasing the railroad for nine hundred and ninety-nine years had been approved by the shareholders.

"This action settled the question of parting with the possession of the property for nine hundred and ninety-nine years. This having been done what business, ordinary or extraordinary, was then left for the Directors of the lessor road to do? They had no railroad to run or manage. The usual ordinary business of the Directors of a railroad as such had ended. Those in office and those afterward elected were empowered, and, in fact, employed in looking after the affairs and interests of the lessor under the lease, and nothing else. Although called directors of a railroad company, they had no railroad to direct; all the property of the railroad company having passed into other hands for a long period of time, with the assent of its shareholders. The ordinary business which remained for the directors to attend to was the collection and distribution of the rents falling due under the lease. Would it be extraordinary business and in excess of their powers to accept and receive a less amount than that reserved in the lease, if unexpected difficulties and complications arose? In other words, to waive part of a demand if it appeared clear that the interests of their principals called for it. Although leasing may be extraordinary business, the element of leasing did not enter into the October agreements, and, therefore, were not the subsequent modifications as to rent, etc., a mere matter relating to money affairs and ordinary 'business,' as that term is generally understood? It clearly appearing that the carrying out of the terms of the lease as to amount of rent to be paid had become an impossibility, what was to be done? A modification was necessary and the October agreements were simply modifications.

"If it be said that if the lessee could not perform it was the duty of the directors of the lessor to have insisted upon the taking possession of the property and to do anything else was extraordinary and not within the power, it must be remembered that all parties had agreed that the running of the roads under one management was a necessity; that they could not be run otherwise, except at the risk of inconvenience and delay to the public and danger to human life.

"To insist upon breaking up the lease because the lessor could not pay the full rent; to resume the old status which all concerned had agreed could not be maintained, except at the risk above mentioned, would have been directly opposed to the expressed views of the shareholders. Therefore, if the lessee was unable to pay all, it was the part of wisdom to agree to take less when to maintain the former agreements was an impossibility, and was fairly within the meaning of ordinary business."

That there is great force in the above argument must be con-

ceded, but I think that its fallacy arises from overlooking the fact that, if the shareholders had the right to determine the terms and conditions upon which their property was to be parted with, such terms and conditions form the consideration for the assent, and the consideration cannot be taken away without destroying the assent. The assent depended upon and was supported by the terms and conditions, it sprang from such terms and conditions, and when they were removed the foundation of the whole structure upon which the assent rested, was removed and the assent necessarily fell. Although it might have been within the powers of the directors to have made temporary arrangements for relief from the difficulties, and such arrangements would be called ordinary business, yet they could not make radical changes in the terms and conditions of the lease as to which the stockholders had never been consulted.

The result of the October agreements certainly was a permanent and radical change in the terms and conditions of the lease.

If the board of directors could not make a new lease upon definite terms and conditions, then, clearly, they could not radically modify the old lease.

If they could not make a new lease directly, then they could not in effect make a new lease by striking out of the old lease substantial covenants upon the part of the lessee and inserting others; what would be unlawful, if done directly, cannot be legal because done indirectly.

It is undoubtedly true that directors may compromise a debt due to their corporation; but the October agreement went much further than this. They changed the lease in many radical and substantial particulars, and took away rights which may have been the very things that induced the shareholders to assent to a leasing of their property, and without the presence of which such assent would never have been given.

It is true that all conceded the necessity of united management, and this concession might have justified the directors in the making of temporary arrangements to continue such management if the lease could not be complied with, until they had an opportunity to consult with their principals; but such concession could not possibly have given the directors power to radically change the old lease for all time, which was in effect done by the October agreements, simply because the corporation through its shareholders had consented to the leasing of its road upon certain other specified terms.

Directors, as I shall hereafter attempt to establish, are the agents of the corporation, having, as such, exclusive authority to act within their sphere. But they are also in some respects, merely the executive agents of the shareholders, and as such may perform certain other acts, if specially authorized thereto by their principals, and in respect to such action they are simply the agents of the share-

holders, as well as of the corporation. The shareholders, the principals having fixed the terms and conditions, which they had a right to do, upon which the directors, their agents were authorized to part with the possession of the property in their charge, and to commit the possession and management thereof into other hands; what right have the agents to radically change or alter these terms and conditions without consulting their principals?

Suppose an agent parts with his principal's property upon certain terms, which have been determined upon by his principal, and the principal has the right to recover back his property if these terms are not complied with; can it be said that the agent, simply because he has a general authority to compromise debts due to his principal, would have the right to alter the terms upon which his principal had authorized him to part with his property, and which were the inducements and the only ones which led the principal to give such authority?

In other words, in case of a failure to comply with the terms upon which the property had been parted with, who is to elect whether the property shall be taken back or not? Is it not the principal? How can the agent claim any power to make this election, simply because he has a general authority to compromise debts.

This would be exercising a widely different authority in the name of the principal from that which would be called into action by the mere taking of a smaller sum in settlement of a larger sum due.

The principal might much prefer to have his property back again rather than to take a smaller sum for it, and he would have the right to determine that question himself.

So in the case at bar; the Metropolitan shareholders filed the terms upon which they would consent to part with their property, and they stipulated that in case those terms were not complied with they should be entitled to recover back their property. Can there be any doubt but that, in case of a failure to comply with the terms which they have fixed, it is a question for them to determine whether they would prefer to take their property again into their own possession and manage it for themselves, rather than to accept different terms from those which had originally induced them to part with their property?

But it is not necessary to pursue further the discussion of this question, because I do not understand that the defendants base their claim of the validity of these agreements upon any such ground; but that they insist that the directors of the New York Co. and those of the Metropolitan Co. did make and had the right to make these leases of May 20, 1879, without any assent upon the part of the stockholders of their respective companies, and that the subsequent submission of the leases to the stockholders was merely to obtain their moral support.

That the directors of a corporation are agents seems to be clearly recognized in all the cases in which the relations of directors and shareholders to their corporation, have been discussed.

It is said in Twin Lick Oil Co. *v.* Marbury, 91 U. S., at page 598, that the directors are the officers or agents of the corporation, and represent the interests of that abstract legal entity, and of those who own the shares of its stock.

In Cumberland Coal Co. *v.* Sherman, 30 Barb. 571, the Court say: "There can be no question at the present time that a director of a corporation is the agent or trustee of the stockholders."

In Angell and Ames on Corporations, section 771, it is stated that, "The stockholders compose the company, and the managers, directors or officers are their agents, necessary for the management of the affairs of the company, but they are not essential to its existence as such, not forming one of the integral parts."

In Abbott *v.* Hard Rubber Co., 33 Barb., at foot of page 591, the Court say: "Boards of directors are agents of the corporation to manage its affairs, and carry out the purpose and object of its formation."

The directors thus being the agents of the corporation, what are their powers and from whence are they derived, and how must corporative powers residing in the corporation, the right to exercise which is not vested in the directors, be brought into operation? These questions are so intimately connected that they must be disposed of together.

The powers of directors are such as are conferred by the charter of their corporation and the laws pertaining thereto, and such corporative powers as are not conferred by law upon the directors, remain in the corporation to be exercised or at least set in motion by its component parts, the shareholders.

In the case at bar, the charter provided that the directors were to manage the business and affairs of the company; and the question involved in this branch of the case is, whether this language conferred the right to exercise every corporate power possessed by the corporation, or merely to manage the ordinary business and affairs of the company for the carrying on of which it was organized, leaving the right remaining in the shareholders composing the company to set in motion or confirm corporate action within the limits of its powers, but extraordinary and unusual in its nature.

Within the sphere of their duties, the right of the directors to act, is undoubtedly exclusive, and further, all corporate acts must be done through them as they are the exclusive executive and administrative authority, but nevertheless all corporate powers do not reside in the board of directors.

It is true that the Court say, in McCullough *v.* Moser, 5 Denio, 575, that: "When a charter invests the board with the power to

manage the concerns of the corporation, the power is exclusive in its character. The corporators have no right to interfere with it, and courts will not, even on the petition of the majority, compel the board to do an act contrary to its judgment."

That case was an action to recover upon a promissory note, which the corporation in the exercise of its legitimate business could have made, and the question presented was whether execution was proved. The note was signed by the president and secretary of the company, but no authority from the board of directors, who by the charter were to conduct the affairs of the company, to the president and secretary was shown. Some resolution of the shareholders was shown, but it had no relation to this question, and then the Court uses the language above quoted. This case nowhere decides that the directors are clothed with all the corporate powers. It may be cited as an authority for the proposition that the shareholders cannot compel the directors to act in any manner against their judgment in the exercise of a corporate power which remains in the corporation.

For example, if the power to lease was vested in the corporation, but the directors could not, because of the limitation in the charter, exercise this power, the shareholders could not cause the lease to be executed and delivered, nor could they compel the directors to execute and deliver the same against their own judgment; all that the shareholders could do would be to authorize the directors to act or confirm an act of the directors which would be incomplete without such ratification.

The case of Hoyt v. Thompson, 19 N. Y., 207, is also claimed to be an authority against the suggestion made above; but upon an examination it will be seen that much is said in respect to the relation of directors to their corporation, and their rights and powers, and the source from which they are derived, which was not at all necessary to the decision of the question involved, and is directly contrary to the principles announced in the United States Supreme Court, in a case where the direct question was presented.

The adjudication in the case of Hoyt v. Thompson had necessarily to be put upon the ground that the act under investigation was "ordinary business," and in that case a distinction was plainly recognized between "ordinary business," and such as was within the corporate powers, but unusual and not coming within the general business of the corporation. The Court held, that although the charter of the corporation declared that its power should be exercised by a board of directors, consisting of a specified number, yet the board might delegate its authority to agents or to a quorum of less than a majority of the number.

The Court further held, that when a by-law of the corporation declared that five directors should be a quorum for the transaction of "ordinary business," the general business of the corpo-

ration was embraced in the authority thus delegated, including as incident thereto, the power of pledging or assigning assets of the corporation for the purpose of securing a debt, it appearing that such pledge was made for the purpose of enabling the corporation to continue its business; and this is all that this case decides which is pertinent to the questions involved in the case at bar.

It is true that the learned judge who wrote the opinion, in the case of Hoyt *v.* Thompson, uses the following language:

"The board of directors of a corporation do not stand in the same relation to the corporate body which a private agent holds to his principal. In the strict relation of principal and agent, all the authority of the latter is derived by delegation from the former, and if the power is not conferred in the appointment, it cannot exist at all. But in corporate bodies the powers of the board of directors, are in a very important sense, original and undelegated. The stockholders do not confer nor can they revoke those powers. They are derivative only in the sense of being received from the State in the act of incorporation. The directors convened as a board are the primary possessors of all the powers which the charter confers."

The whole of this argument was devoted to establishing the power of the board of directors to delegate the authority to manage the ordinary business of the corporation to five of their number, and had no other purpose.

That the directors convened as a board, are not the primary possessors of all the powers which the charter confers, is expressly held by the United States Supreme Court, in the case of the Railway Company *v.* Allerton, 85 U. S. Supreme Court Reports, 233. In that case the charter provided as follows:

"Section 3. The capital stock of said corporation shall be one hundred thousand dollars, and may be increased from time to time at the pleasure of said corporation.

"Section 4. All the corporate powers of said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint."

An increase of the capital stock of the corporation by the directors, without the assent of the stockholders, was held to be void, as beyond the power of the board of directors, although the charter provided that all the corporate powers of the corporation should be vested in and exercised by a board of directors, etc., and that the powers thus granted to the directors refer only to the ordinary business transactions of the corporation. The necessary conclusion to be drawn from the reasoning employed in that case is, that the board of directors are the managers of the business which the corporation is chartered to carry on, and they have the control and management of that business; but that they have no power to effect organic and fundamental changes in the corporation or its

business without the consent of the corporation. The Metropolitan Co. was chartered for the purpose of making, constructing, maintaining and operating a railway upon certain streets, avenues, thoroughfares and places in the City of New York. This was its business, and this was all the business upon the execution of which it entered. Could it be imagined that a change more fundamental could possibly be made, than that a corporation, chartered for the above purpose, should lease its road and properties to another corporation and deliver possession of the same for all time, and thus change its business from that of making, constructing, maintaining and operating a railroad, to that of receiving rent for the use of such road?

In considering this question, it is not at all improper to look for a moment at the result arising from a rule, that the directors are the primary possessors of all the powers which the charter confers. If the board of directors have the power without the assent of the shareholders, to lease the properties of the corporation for all time, then the shareholders may be deprived of, not only the administration of their property through its agents, the directors, but its very possession, without a moment's warning. A board of directors are elected for one year, to manage the business and affairs of the corporation, such business being the operating and maintaing a railroad. At the time of their election, the shareholders have no intimation that anything else is to be done by the directors, and the expectation is that such directors, at the end of their year in office, will turn over the property committed to them to their successors in office, with an account of their stewardship. Can it be possible that this board, elected for only one year, without any notice or warning, has the power to terminate the business of the corporation, and transfer all the properties to another corporation? It seems to me, clearly not. This is not the management of the business of the corporation. It is terminating the business, to carry on which it was incorporated. It is just as fundamental and radical a change as an increase of its capital stock, or the entering upon a new business by a corporation authorized by its charter can possibly be. Although I have not intended to quote as authority any decision except those of our own State, or of the United States Supreme Court, I must refer to the language used by the learned court in the case of Cass. *v.* Manchester, 13 Reporter, 167, in which it was held, that directors had no power to make a lease, even for five years, without the consent of the shareholders. The Court says:

"But if this conclusion is the result of too strict a construction of the charter, we are of the opinion that the power in question is not exercisable independently of the judgments of the stockholders. The directors and officers of a corporation are its exclusive executive agents, and, as it can only act by and through them, the powers

vested in the corporation are deemed to be conferred upon its representatives, but they are, nevertheless, trustees for the stockholders. The law recognizes the stockholders as the ultimately controlling power in the corporation, because they may at each authorized election entirely change the organization, and may at any time keep the trustees within the line of faithful administration by an appeal to a court of equity. Hence it has been held that the directors of a corporation cannot alone increase its capital stock, where such increase was authorized by its charter 'at the pleasure of said corporation,' and where it was provided that 'all powers of such corporation shall be vested in and exercised by a board of directors,' etc.; and this for the reason that the general power to perform all corporate acts refers to the ordinary business transactions of 'the corporation,' and not to a change so fundamental and organic. 18 Wall. 234.

"The change proposed is not organic, but it is thorough and fundamental, as it affects the administration of the company's affairs. It involves a withdrawal from the control and management of the stockholders of the entire property of the corporation for at least five years; it will preclude, for a like period, the exercise by the stockholders of their judgment as to the particular character and method of conducting the business affairs of the corporation; and it denies to the stockholders any right of suggestion or disapproval of the conditions, when such a relinquishment of important corporate faculties may be conceded. Surely a power which will be attended with such consequences does not relate 'to the ordinary business transactions,' nor 'to the orderly and proper administration of the affairs' of the company; and hence cannot be exercised by the directors without express authority to them."

In opposition to this view is cited by the learned counsel for the defendants, the case of the Excelsior Fire Insurance Co., 19 Abbott., p. 14, in which it was said:

"The statute says the company is authorized to reduce the number of its directors, etc. It makes no provision for a meeting of the stockholders for that purpose. In the absence of any provision of that character the power is vested in the board of directors; stockholders, as such, possess no powers in the management of the corporation, except when specially authorized so to do by their charter. Their power ends with the selection of directors."

Also in Elwell *v.* Dodge, 33 Barb. 339, the Court say:

"A general resolution of the directors delegating power to transfer property or choses in action to meet the exigencies of the company, or a ratification of this particular transfer by act or resolution of the board, or acceptance and appropriation of the fruits of the transaction if a special resolution authorizing the transfer and use of this note was wanting, would be sufficient to sustain the endorse-

ment as the act of the company even against the company, and might have been proved had the precise point now made been then taken."

The language of Judge Selden, in the case of Robertson v. Bullions, 11 N.Y., p. 250, is also referred to. He says:

"What, then, are the powers, rights and obligations of this class of corporate officers, and to what extent has this Court jurisdiction over them?"

* * * * * * *

"These officers are trustees in the same sense that the president and directors of a bank or of a railroad company. They are the officers of the corporation to whom is delegated the power of managing its concerns, for the common benefit of themselves and all other corporators, and over whom the body corporate retains control, through its power to supersede them at every recurring election."

In the matter of St. Ann's Church, 23 How. 285, Judge Emott says:

"The officers thus chosen are not trustees in the sense in which an individual becomes or is made a private trustee. They are simply officers of the corporation. As such officers, they represent the corporation; they are its managing agents, and they may act for the corporation as fully as the directors or agents of an ordinary corporation may act in its behalf. A corporation ordinarily acts through its officers and through them only. The power of managing its concerns is delegated to its officers, and they are to manage them for the common benefit of themselves and all the other corporators. These officers are liable, it may be, to judicial proceedings to control their action where it is fraudulent or destructive of the rights and interests of the corporation. They are responsible, however, more directly and practically to the corporate body itself, through the power of the corporators to supersede them at their elections."

In the case of Dana v. The Bank of U. S., 5 W. & S. 246, the following passage occurs:

"This I take (that is to say, the election) is the utmost that the stockholders can do according to the tenor and design of the act under which they must all act until an election of the directors shall come around, when the former, if dissatisfied with the conduct of the latter in managing the affairs of the bank may turn any one, or more, or the whole of them out of the direction, and place it in other hands."

The claim made by virtue of these decisions is that the stockholders have no power to do anything in relation to any matter whatever pertaining to their corporation, except that if dissatisfied with the conduct of their directors in managing the affairs of the corporation they may turn them out at the next election; and this

is certainly the language of all the above decisions. But how inapplicable is such remedy to an act of the directors which has terminated the business of the corporation, and placed all its property in other hands for a thousand years; will that give back the property to the corporation; will that set right any maladministration if the directors had the power to thus act? Clearly not, and the language was intended to apply to cases where the action taken was neither radical nor fundamental in its character. For mismanagement of the ordinary business of the company, the turning out of the directors is a reasonably adequate redress; but when the directors have divested the company of all its property, it is difficult to see how any remedy is afforded by turning them out. Further, the courts of this State as has already been seen, expressly recognize the fact, notwithstanding the decision above mentioned, that the shareholders have certain other rights and privileges beside that of electing directors, viz.: the right to be consulted in respect to change of business, increase of capital stock, dissolving and winding up the affairs of the corporation, sale of any portion of its property necessary for the transaction of its business, etc.

It need hardly, therefore, be necessary, in view of the principles which have controlled the decisions already quoted, to discuss further the question that there are powers reserved to the corporation which cannot be exercised by the directors without the assent of the shareholders, and that the shareholders, under some circumstances at least, may exercise other functions than simply those of electing their board of directors. Nor is it necessary now, to dwell upon the scope of the act of 1839, or to attempt to show that by this act, the Metropolitan Ry. Co. had the power to lease its road and properties. That such power existed is now conceded by the counsel for the plaintiff, in view of the decision of the Court of Appeals in the case of Woodruff *v.* The Erie R. R. Co., 93 N. Y. 609.

It is claimed by the counsel for the defendants that as far as this State is concerned, at least the power of a board of directors to lease without the assent of shareholders, has been expressly recognized by the legislature of this State, and various acts of the legislature are cited, in which leases of railroad and consolidation of railroads are authorized to be made as the directors shall determine. It seems to me, that instead of these acts being an evidence of a legislative construction that under the act of 1839, directors had the power to lease without the assent of the shareholders, it was only because such acts could not be performed by the directors alone that it was thought necessary to confer express powers upon the directors. If the power was conferred upon the corporation, the directors alone could not exercise it, and, therefore, the legislature conferred the power expressly upon the directors.

Attention has also been called to various cases where the assent of stockholders is provided for as a condition of corporate action.

It will be seen that in every case it is a limitation upon corporate action by requiring more than a majority of stockholders to assent, or the conferring of a new power upon corporations and affixing the conditions upon which such power is to be exercised.

I fail to see that legislation of this character in any way aids us in the determination of this question. If, however, a solution of the problem is to be reached by the light of legislative interpretation, chapter 349, of the Laws of 1880, seems clearly to indicate the necessity of stockholders' assent, given at a stockholders' meeting, to the leasing of the property of a railroad corporation; otherwise, what necessity for legislative intervention in the terms of the act referred to?

The cases of Fisher *v.* N. Y. Central R. R. Co., 46 N. Y., and the Central Cross Town Co. *v.* The Twenty-third Street T. T. Co., 54 Howard, P. R. 183, are cited as deciding that a lease may be made without the assent of the shareholders. I have failed to find any such adjudication in either of those cases. All that can be claimed for those cases is that they decide that a lease of its road, made by a railroad corporation, is not ultra vires, and they decide nothing more upon the question of power.

No question is raised or discussed, as to the manner of the exercise of its power by the corporation. There was no person before the court seeking to impeach the lease, who could be heard upon the question of stockholders' assent. The only question was whether the lease was not actually void, not voidable.

There is no question, but that admitting that a board of directors alone have no power to lease the property of their corporation, and if such lease is executed by the directors without the assent of the stockholders, such stockholders may accept the lease or repudiate it; and that, if they allow the parties to the lease to go on under the lease without any action being taken in respect thereto, within a reasonable time, they will be held to have acquiesced in the lease and ratified it. Therefore, conceding that the corporation has the power to lease, when the action is taken and the stockholders have acquiesced, no third party can raise the objection that the stockholders have not formally assented.

In the cases cited the leases had long been in operation and the time for dissent had long passed, and, therefore, the only question that could be raised was the power of the corporation to act at all. After an examination of the reasoning in all the adjudicated cases (which has been by no means cursory), after a consideration of the principles governing the relations of shareholders of a corporation and its directors, conceding that a corporation can do no act unless specially authorized thereto, except through its board of directors, I am irresistibly brought to the conclusion that acts making

organic or fundamental changes in the character or business of the corporation, cannot be done either by the directors alone, or by the shareholders alone; but that both the executive and administrative officers of the corporation must unite with the shareholders of the corporation, who confer the right to act upon the individuals entrusted with the office of directors. That directors are merely temporary officers of the corporation, by virtue of their office entitled to manage the business and affairs of the corporation during their term of office without interference from the stockholders, but they cannot say that a new board of directors, although duly elected by the stockholders, shall never thereafter interfere with the management of the properties of the corporation, because they have placed their possession and management into other hands forever.

This brings me to the consideration of the remaining question:

Were the agreements voidable at the option of the Metropolitan Co., because three of its directors were also directors of the Manhattan Co.; or because Metropolitan directors held also stock in the Mahattan Co.?

In considering this question, it must be conceded at the outset that the interests of the Manhattan Co. were directly antagonistic to those of the Metropolitan Co.

In the negotiations which resulted in the October agreements, it was for the interest of the Manhattan Co. to get as large a reduction of rental as possible; and it was the interest of the Metropolitan Co. to secure as advantageous terms as the Manhattan Co. could comply with, and a similar interest pertained to the New York Co.; but it was to the interest of neither to secure such terms as would bring about again the disasters under which the whole elevated system was then suffering.

Three propositions are urged in answer to the claim of the plaintiff, that the conflicting interests rendered the October agreements voidable. The first is, that although conflicting interests may disqualify an agent, strictly so called, from acting, that this rule does not apply to trading corporations, so many of whom have common directors. Secondly, if such conflicting interest induces any incapacity, it is not fatal to the agreement, if such agreement can be proven just and fair; and thirdly, that if any of the directors were disqualified because of an adverse interest, enough voted for the adoption of the agreement who were not disqualified, to have carried the measure, even if all the disqualified directors had voted no.

It will not be denied, I imagine, that as between natural persons, where an agent or trustee has a personal interest opposed to that of the principal, or where a man acts as agent of both parties to the contract, although he may have no personal interest on either

side, that the principal or cestui que trust may avoid the contract at will, even if there be no actual fraud or damage.

The cases in this State and in England, seem to be very explicit upon this point, and it might perhaps be necessary only to refer to the language of the Chancellor, used in the case of Davoue v. Fanning, 2 Johns. C. R., p. 26, which sets forth in the clearest language, the principle upon which that rule is founded. He says:

"However innocent the purchaser may be in the given case, it is poisonous in its consequences. The cestui que trust is not bound to prove, nor is the Court bound to judge, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. There may be fraud, as Lord Hardwicke observed, and the party not able to prove it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the cestui que trust to come, at his option, and without showing actual injury, and insist upon having the experiment of another sale. This is a remedy which goes deep, and touches the very root of the evil."

In Taussig v. Hart, 58 N. Y. 428, the Court say:

"It is no answer that the intention was honest and that the brokers did better for their principal by selling him their own stock than they could have done by going into the open market. The rule is inflexible, and although its violation in this particular case caused no damage to the principal, he cannot be compelled to adopt the purchase."

In N. Y. Central Ins. Co. v. Nat. Protection Ins. Co., 14 N. Y., p. 91, it was said:

"It is not necessary for a party seeking to avoid a contract on this ground to show that an improper advantage has been gained over him. It is at his option to repudiate or to affirm the contract irrespective of any proof of actual fraud."

In Conkey v. Bond, 36 N. Y., p. 429, it was said:

"It is not material to inquire whether the defendant had any actual fraudulent purpose. The making of a purchase from himself without authority from the plaintiff was a constructive fraud, in view of the fiduciary relation which existed between the parties. In such a case the law delivers the agent from temptation by a presumptio juris et de jure, which good intentions are unavailing to repel."

In the case of Greenlaw v. King, 3 Beav., p. 61, Lord Eldon says:

"If a trustee can buy in an honest case, he may in a case having that appearance, but which, from the infirmity of human testimony, may be grossly otherwise. The impossibility of detecting the conduct of parties placed in such situations, is the reason which imposes upon the Court a necessity, which I believe has always been

acted on, of saying that such transactions shall not stand at all. You have not the means of finding out all the modes in which advantage can be taken, and, therefore, it is safer, and the interests of society require that you should forbid such transactions altogether."

Also, in ex parte James, 8 Vesey, p. 344.

"This doctrine as to purchases by trustee, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this, that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance, as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases."

In Gillet *v.* Peppercorne, 3 Beav. 84, it is said:

"It is not necessary to show that fraud was intended, or that loss afterwards took place in consequence of these transactions, because the defendant, though he might have entertained no intention whatever of fraud, was placed in such a situation of trust with regard to the plaintiff, that the transaction cannot, in the contemplation of this Court, be considered valid."

We might multiply authorities upon this point, but these are sufficient to show how stringently the rule has always been applied, and that under no circumstances should it be departed from.

It was intimated, that although this rule was so stringent as to purchases and sales, yet that it was not applied with the same rigor to other contracts. I have failed to find any foundation for this distinction either upon principle or authority. It may be true that most of the adjudicated cases have arisen in reference to purchases and sales, but no distinction has been made by any court between contracts of this nature and any others which were tainted with the same infirmity. There is no reason for any such limitation, and I do not find that it has ever been attempted to be enforced.

In the case of the Aberdeen Ry. Co. *v.* Blaikie Brothers, 1 Macqueen, the same point was suggested, and the Court say upon this point:

"It is true that the questions have generally arisen on agreements for purchase or lease of land, and not as here on a contract of a mercantile character. But that can make no difference in principle. The inability to contract depends, not on the subject-matter of the agreement, but on the fiduciary character of the contracting party, and I cannot entertain a doubt of its being applicable to the case of a party who is acting as manager of a mercantile or trading business for the benefit of others, no less than to that of an agent or trustee employed in selling or letting land."

But it is urged that this incapacity does not apply to the direc-

tors of a corporation. That the director of a corporation may contract with his corporation, and such contracts will be held valid if such contract is shown to be just and fair, because a director of a corporation is not the agent or trustee in the ordinary sense. He is not a trustee of the shareholders but a trustee of the corporation; and in support of this proposition attention is called to the language used in the case of Duncomb *v.* The New York, Housatonic & Northern R. R. Co., 84 N. Y., p. 198. The Court say:

"Whether a director of a corporation is to be called a trustee or not, in the strict sense, there can be no doubt that his character is fiduciary. The doctrine is, in equity, that confidence shall not be abused by the party in whom it is reposed."

* * * * * * *

"But the rule was adopted to secure justice and not to work injustice; to prevent wrong, not to substitute one wrong for another; and hence have arisen limitations upon its operation, intended to guard it against evil results as inequitable as those it was designed to prevent."

This language must be interpreted, having in view the facts of the case under consideration, and what wrong it was proposed to commit under the alleged forms of law. The Court was speaking in reference to a claim made by the defendants of its right to keep the money loaned by the director to the corporation, and to avoid the security given for its repayment. The Court adds, "Thus, the beneficiary may avoid the act of the trustee, but cannot do so without restoring what he has received," and applied the rule, that before it could repudiate its contract of security, it must return that which it had received.

Reference is further made to the language used in Angell & Ames on Corporations, sec. 233, which is as follows:

"By the common law, and by the Civil Code, too, as a corporation aggregate may contract with persons who are not members, so it may contract with persons who are members of it; and the contract is not on this account invalid; a member of a corporation contracting with it being regarded, as to that contract, a stranger. Hence, a vote of the corporation affecting a contract between it and a member cannot bind the member without his assent to it. And though the member of the corporation be also one of the trustees of the corporation, it would seem that this would not incapacitate him from contracting with it; but he may recover against the corporation for his services rendered under a contract with the other trustees, in a case where there is no evidence of such gross partiality in the contract as amounts to fraud. And where the members of three distinct corporations were the same, yet, in the Proprietors of the Canal Bridge *v.* Gordon, it was held by the Supreme Court of Massachusetts, that contracts between the several corporations were valid, and might even be implied from corporate

acts. The banking associations of New York, under the general bank law of 1838, are to be regarded for this purpose as bodies corporate; and hence, in a suit at law by such an association against one of its members for debt, the fact of membership presents no objection to recovery."

And also the case of Jackson *v.* The New York Central R. R. Co., 2 T. & C. 653, and affirmed in the Court of Appeals upon the opinion of the Court below, 58 N. Y. 623, in which a director was allowed to recover from the corporation for the value of certain professional services outside of and beyond those pertaining to his office, rendered to the corporation of which he was a director. This latter case may be sustained upon the ground that as the corporation had received the services of this director, had availed themselves of them, and could not restore, it was bound to pay their value. No such ground is mentioned in the opinion of the learned Court which decided this case, but there is no statement of the principle upon which the right to a recovery rests, and the judgment of the Court was founded probably entirely upon the concession of counsel. It is true that the Court say that the authorities are quite clear upon the subject; but in those cited, no such question was involved, except in the case of Chandler *v.* Monmouth Bank, 1 Green, N. J. 255, which asserts the law, but does not define in any way upon what principle it is founded. The view that a contract between a director and his corporation is voidable absolutely, is distinctly held in the case of Cumberland Coal Company *v.* Sherman, 30 Bark. 563, where the Court says: "The cases relating to the dealings of an agent or trustee with the property in reference to which his agency or trust exists, may be arranged into two classes. First—Cases in which a trustee buys or contracts with himself, or several trustees of which he is one, or a board of trustees, of which he is one; and it will be seen by reference to the authorities hereinafter cited, that the incapacity to purchase, applies to all these cases. Second—Cases in which a trustee buys or contracts with his cestui que trust, who is sui juris, and is competent to deal independently of the trustees in respect to the trust estate.

"As to the first class of cases, the purchase or contract is voidable at the option of the cestui que trust, without reference to the fairness or unfairness of the purchase or contract. For the reasons before given, the disqualification of the party purchasing or contracting is a conclusion of law, and is absolute."

Some confusion seems to have arisen in the enunciation of the principle under discussion, because of a failure to distinguish between the two classes of cases. The disability as to dealings between trustee and cestui que trust being absolute, while that in respect to dealings between attorney and client is less strict. Story, in his Equity Jurisprudence, section 311, says: "In this respect

there is said to be a distinction between the case of an attorney and client, and that of a trustee and cestui que trust. In the former, if the attorney, retaining his connection, contracts with his client, he is subject to the onus of proving that no advantage has been taken of the situation of the latter. But in the case of a trustee, it is not sufficient to show that no advantage has been taken, but the cestui que trust may set aside the transaction at his own option."

The ground upon which the decision of the case of Jackson *v.* The New York Central R. R. Co., supra, may well have proceeded is well stated in the opinion in the case of Gardner *v.* Butler, 30 N. J. Eq. 702, where it is said: "The rule is, that the trustee cannot fortify himself by a contract which he makes with himself, or for his own interest and set it up, either at law or in equity, as a valid obligation. It is of no binding force as a contract, and the cestui que trust may repudiate it at will. The agreements, therefore, which the directors made with themselves, must be pronounced to be illegal, and can furnish no support to their defense as contracts. But while the express undertaking is withoul legal force, the directors of a company have a right to serve it in the capacity of officers, agents or employees, and for such services the law will enable them to recover a just and reasonable compensation. The law restrains them from making a contract where their own gain intervenes between their exercise of judgment and their duty as trustees, but it does not operate to deprive the company of the service of those who, in many cases, may alone possess the skill requisite to the successful management and conduct of the corporate business, and who may have the chiefest interest in its prosperity. Stockholders, because they are directors, are not compelled to commit the success of their company to strangers, or else render their own services gratuitously. No claim which they may make against their company can acquire any support or validity from the fact that they have expressly sanctioned it; it must rest exclusively upon its fairness and justice, and be enforced upon the quantum meruit. That such is the full scope and effect of the rule, and the extent to which the transaction is annulled, will be found by an examination of the cases."

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"The same principle must apply, whether it is property conveyed or services rendered to the company. The cupidity and avarice of the trustee is guarded against by giving the cestui que trust the right to repudiate the contract at all times, where it is executory, and to allow simply a just remuneration, without reference to the contract price where it is executed. The trustee thus derives no advantage from his breach of duty, and the company can suffer no detriment from his service in their behalf."

In the case of Thomas *v.* The Brownville, Fort Kearney & Pacific R. R. Co. et al., decided in the Supreme Court of the United

States in October last, the right to recover upon a quantum meruit for services rendered and materials furnished under a voidable contract, is distinctly enunciated. The Court say: "But we are asked to reverse the decree so far as to permit the trustee in this case to recover such a sum as the Construction Co. actually earned in building the road. The matter was referred to a master, who, on this hypothesis, reported that the contractors had done work for the railroad company, which it had accepted to the value of $205,947.66, beyond what they had received payment for, except as it was paid by these bonds. He also reported that this work was of that much advantage to the company, and its value or cost is estimated on a quantum meruit, without regard to the prices fixed by the contract.

"We are of the opinion that the appellant's view of this part of the transaction is sound.

"The bonds and mortgage in the hands of the trustee were issued in payment for this work. To the extent of $205,947.66, the consideration is good, and no sound principle is seen on which they cannot to that extent be enforced. To this extent they do not rest on the original contract, but on work, labor and material actually furnished to the company and received by it. These services and materials are not estimated by the prices named in the contract, but by their real value to the company."

In the case of Wardell *v.* The Union Pacific R. R. Co., 103 U. S. R. 659, the incapacity of a director to contract with the company is recognized, and also his right to recover for services and materials upon a quantum meruit.

The language used in the above section quoted from Angell & Ames on Corporations is certainly broad enough to cover the proposition in question; but I have examined, with care, the authorities cited to sustain the broad language of the text, and none go so far as to hold that a corporation may contract with one of its directors, or that two corporations, having common directors, may contract with each other.

In the case of the Proprietors of the Canal Bridge *v.* Gordon, 1 Pick. 297, which is the authority cited, the question decided was that a contract might be implied from corporate acts and nothing more. But in any event the contrary rule seems to be clearly established by the decisions of this State, founded upon the rule as laid down in the English courts, and the United States Supreme Court.

In the case of Hoyle *v.* Plattsburg & Montreal R. R. Co., 54 N. Y. 328, it was held, that the office of director of a railroad company is fiduciary in its character, and, as a consequence, he is incapacitated from dealing in his own behalf in respect to the corporate property or in respect to any matter involving his powers and duties as such director: that this incapacity is not limited to the particular

times when he is acting as director, but continues during the period of his directorship, and that therefore, a director (considering that relationship only) cannot become purchaser of the property of the corporation upon a sale under an execution against it, except subject to the right to disaffirm and demand a resale. Actual fraud or actual advantage in such case need not be shown.

The foregoing rule is approved in the case of Duncomb *v.* The New York, Housatonic & Northern R. R. Co., 84 N. Y., p. 190, above referred to. The Court uses the following language: "It is not intended to deny, or question, the rule that whether a director of a corporation is to be called a trustee, or not, in a strict sense, there can be no doubt that his character is fiduciary, being intrusted by others with powers which are to be exercised for the common and general interests of the corporation, and not for his own private interests, and that he falls, therefore, within the doctrine by which equity requires that confidence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon the party intrusted to deal, on his own behalf. Hoyle *v.* Plattsburgh & Montreal R. R. Co., 54 N. Y. 328; Gardner *v.* Ogden, 22 Id. 327; Twin Lock Oil Co. *v.* Marbury, 1 Otto, 587; Smith *v.* Lansing, 22 N. Y. 531; Aberdeen Ry. Co. *v.* Blaikie, 1 Macq. 461.

Nor is it at all questioned that, in such cases, the right of the beneficiary, or those claiming through him, to avoidance, does not depend upon the question whether the trustee in fact has acted fraudulently, or in good faith and honestly, but is founded upon the known weakness of human nature, and the peril of permitting any sort of collision between the personal interests of the individual and his duties in his fiduciary character."

In the case of Barnes *v.* Brown, 80 N. Y. 535, the question as to the inability of a director to contract with his corporation, was distinctively presented, and it was claimed in that case that the disability went so far that an assignment of an interest in a contract made to an independent party was absolutely void, and that such director could not transfer any title by a subsequent assignment. The Court say, referring to this point: "We must assume, therefore, here, that it was, when made, a legal contract, such as the corporators could make. It is claimed however, that the assignment of the interest in that contract to the plaintiff while he was a director was void as being contrary to public policy. It is true that the plaintiff, while acting as director of the corporation, held a fiduciary relation to it. He was a trustee of the corporation and was under the same disability which attaches to all trustees in dealing with trust property, and in transacting the business pertaining to the trust. He could not act as trustee and for himself at the same time, and he would not be permitted to make a profit to himself in his dealings with the corporation. It is against public poli-

cy to allow persons occupying fiduciary relations to be placed in such positions as that there will be constant danger of a betrayal of trust by the vigorous operation of selfish motives. The rules upon this subject are illustrated in many cases, but few of which are here cited. Risley *v.* Indianapolis B. & W. R. R. Co., 62 N. Y. 240; Butts *v.* Wood, 37 Id. 317; Stewart *v.* The Lehigh Valley R. R. Co., 9 Vroom, 506; Gardner *v.* Butler, 30 N. J. Eq. 703; Foster *v.* The Oxford W. & W. Ry. Co., 14 Eng. I., and Eq. 306; Aberdeen Ry. Co. *v.* Blaikie, 1 Macqueen H. L. 461.

"The assignment of a portion of the Byrne contract to the plaintiff did not render that contract void. There was nothing done under the contract. If the plaintiff had attempted to do anything under it, so that his interest under it might come in conflict with his duty as trustee, then the principle of the above cases could have been invoked against him. The corporation could have permitted him and Byrne to perform the contract and then could make him account to it for all the profits he made by such performance. If he had attempted to perform the contract while he was director, the shareholders could probably have intervened, by some suit in equity adapted to the nature of the case, to nullify the contract as to him, or to restrain him from the performance thereof, or to compel him to elect to resign his office of director or to give up the contract. In any view of the case, the assignment to him was not absolutely void; it was at most voidable at the election of the corporation or its stockholders. Besides, the assignment to him did not destroy the Byrne contract, and before he attempted with Byrne to perform it, and before any objection was made by the corporation or any of its stockholders to his connection with it, he assigned, as he was perfectly competent to do, all his interest therein to Brown and Seligman, who were perfectly competent to take."

In Aberdeen Ry. Co. *v.* Blaikie Bros., 1 Macq. 461, which is the leading case in England upon this point, the question was as to the validity of a contract made by the plaintiff with the defendants, a firm, one of whose members was a director in the railway company; and the Court say:

"The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation, whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal, and it is a rule of universal application, that no one having such duties to discharge shall be allowed to enter into engagements, in which he has or can have a personal interest conflicting, or which possibly may conflict with the interests of those whom he is bound to protect."

"So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so

entered into. It obviously is, or may be, impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best, for the interests of the cestui que trust, which it was impossible to obtain.

"It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could be obtained from any other person; they may even at the time have been better.

"But still so inflexible is the rule that no inquiry on that subject is permitted. The English authorities on this subject are numerous and uniform."

The decision in this case, seems to me to have been based upon principle and not upon the 85th, 86th, and 87th sections of the Act of 8 and 9 Vic. ch. 16, which provided that "No person interested in any contract with the company shall be capable of being a director, and no director shall be capable of being interested in any contract with the company during the time he shall be director," and that "if any director at any time subsequent to his election be directly or indirectly concerned in any contract with the company then the office of such director shall become vacant and he shall cease from voting or acting as director;" and that "no person being a shareholder or member of any incorporated joint stock company shall be disqualified or prevented from acting as a director by reason of any contract entered into between such joint stock company and the company incorporated by the special act; but no such director being a shareholder or member of any such joint company shall vote on any question as to any contract with such joint stock company." In the case of Foster *v.* Oxford, etc., Ry. Co., 13 Common Bench R. 200, this act was construed as imposing at law the penalties prescribed in the act, viz.: the loss of his office by any director becoming or being interested in any contract with the corporation during his term of office. The contracts being valid, no greater penalty could be imposed by a law court than was provided by the act.

In the case of the Aberdeen Ry. Co. *v.* Blaikie Bros., supra, this case is referred to, and the decision is sustained upon the ground that at law the contract was valid, while in equity it was voidable. The Lord Chancellor says: "The statute, i.e., the Company's Clauses Act, it was argued, has implied, if not expressly recognized the validity of the contract, by enacting that its effect shall be to remove the director from his office, indicating thereby that a binding obligation would have been created which would render the longer tenure of the office of director inexpedient, and reference was made to the case of Foster *v.* The Oxford, Western and Wolverhampton Ry. Co. This was an action for breach of a contract under seal whereby the defendants covenanted with the plaintiffs

to purchase for them a quantity of iron. The defendants pleaded that at the time of the contract one of the plaintiffs was a director of their company, and to this plea there was a general demurrer. That such a contract would in this country be good at common law, is certain. The rule which we have been discussing is a mere equitable rule, and therefore all that the Court of Common Pleas had to consider was how far the contract was affected by the statute. The decision was that the statute left the contract untouched and that its operation was only to remove the director from his office. The 85th and 86th sections of the English statute, 8 and 9 Vic. ch. 16, on which the Court proceeded, are in the same words as the 88th and 89th sections of the Scotch statute, and the counsel relied on this decision as being strictly applicable to the acts now under appeal; but there is a clear distinction between them. In Scotland there is no technical division of law and equity; the whole question, equitable as well as legal, was before the Court of Sessions. All that the Court of Common Pleas decided was that a contract clearly good at law, was not made void by an enactment that its effect should be to deprive one of the contracting parties of an office. This decision will not help the respondents unless they can go further and show that the statute has had the effect of making valid a contract which is bad on general principles, that is to say, principles enforceable here only in equity and not recognized in our courts of common law."

Lord Brougham, in his opinion states: "I also concur with my noble and learned friend that the decision in the case of Foster *v.* The Wolverhampton Co., in the Court of Common Pleas, upon which great reliance was placed, and which appears, to a certain degree at least, to have been the ruling decision in the Court below, does not apply to this case, because there the transaction was past all doubt valid at common law, though not in equity. But had the Court of Common Pleas had an equitable jurisdiction, as well as a common law jurisdiction, the anomaly could never have happened of a transaction being found legal and valid in that Court which could not stand an examination on the other side of Westminster Hall."

The language used by the Court in its opinion in Twin Lock Oil Co. *v.* Marbury, 91 U. S. Sup. Ct. 587, seems, certainly, to sustain the views of the learned counsel for the defendants upon this point. The Court say: "That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others. Koehler *v.* Black River Falls Iron Co., 2 Black. 715; Drury *v.* Cross, 7 Wall. 299; Luxemberg R. R. Co. *v.* Maquay,

25 Beav. 586; The Cumberland Co. v. Sherman, 30 Barb. 553; 16 id. 456. The general doctrine, however, in regard to contracts of this class, is, not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it. We say, this is the general rule; for there may be cases where such contracts would be void ab initio; as when an agent to sell buys of himself and by his power of attorney conveys to himself that which he was authorized to sell. But, even here, acts which amount to a ratification by the principal may validate the sale.

"The present case is not one of that class. While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open, and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given.

There are in such a transaction three distinct parties whose interest is affected by it, namely, the lender, the corporation, and the stockholders of the corporation.

"The directors are the officers or agents of the corporation and represent the interests of that abstract legal entity, and of those who own the shares of its stocks. One of the objects of creating a corporation by law is to enable it to make contracts, and these contracts may be made with its stockholders as well as with others. In some classes of corporations, as in mutual insurance companies, the main object of the act of incorporation is to enable the company to make contracts with its stockholders, or with persons who become stockholders by the very act of making the contract of insurance. It is very true that as a stockholder in making a contract of any kind with the corporation of which he is a member, is in some sense dealing with a creature of which he is a part, and holds a common interest with the other stockholders who, with him, constitute the whole of that artificial entity, he is properly held to a larger measure of candor and good faith than if he were not a stockholder. So, when the lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing in this regard the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by

the stockholders who appointed him their agent. If he should be a sole director, or one of a smaller number vested with certain powers, this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness. All this falls far short, however, of holding that no such contract can be made which will be valid, and we entertain no doubt that the defendant in this case could make a loan of money to the company, and as we have already said that the evidence shows it to have been an honest transaction for the benefit of the corporation and its shareholders, both in the rate of interest and in the security taken, we think it was valid originally, whether liable to be avoided afterwards by the company or not."

But I think that a careful examination of this case will show that the learned Court's language was intended to show that such a contract was not absolutely void, so as not under any circumstances to afford the basis for future action, or subsequent rights. The last clause of the language above quoted seems clearly to indicate this, which is: "We think it was valid originally, whether liable to be avoided afterwards by the company or not." In other words, it was valid at law, but subject to avoidance in equity by the company, if such right was exercised within a reasonable time, and the sale in that case was upheld expressly upon the ground of laches. One of the grounds upon which it was sought to set aside the sale was because of certain declarations made by the defendant that he only designed to purchase the property for the benefit of all or a part of the shareholders, and the Court say: "But we need not decide whether any of these declarations raised a legal obligation to do so or not, nor whether, without such declarations, the sale and deed were voidable at the election of the complainants, a proposition which is entitled to more consideration, resting solely on the fiduciary relations of the defendant to the plaintiffs than on the evidence in this case of the declarations referred to; we need not decide either of these propositions, because plaintiff comes too late with the offer to avoid the sale."

This language is entirely consistent with the view that the Court did consider such contracts, although valid at law, voidable in equity at the option of the corporation, and the decision as above stated is put distinctly upon the ground of laches. This case, therefore, decides nothing whatever which is in any respect in hostility to the rule as laid down by the decisions in the Courts of our own State. The learned Court, in its language referring to the fact that a contract to repay money loaned made by a corporation with one of its directors, has been held to be valid, seems to have overlooked the fact, that in any event such a contract could not be repudiated by the corporation without the return of the money received by it, and, therefore, the result would be precisely

the same if the transaction was open and free from blame, whether the contract was held to be voidable or binding, as the corporation could not disaffirn without returning the money loaned to it, and this seems to be the foundation of those cases holding such contracts valid.

I think, therefore, that the undoubted rule of law in this State is, that every contract entered into by a director with his corporation may be avoided by the corporation within a reasonable time, irrespective of the merits of the contract itself.

But we are asked, does this disability extend to the case of a contract between two corporations, some of whose directors hold that office in each corporation?

I can see no difference in principle between the case of a director contracting with his corporation and that of directors of one corporation contracting with themselves as directors of another corporation. The evils to be avoided are the same; the temptations to a breach of trust are the same; the want of independent action exists, and the divided allegiance is just as apparent. The fact that there is no such distinction is expressly stated in the case of Wallace v. Long Island R. R. Co., 12 Hun, 464. The Court say: "The rule that persons acting in a fiduciary capacity, shall not, directly or indirectly, make any profit by means of such acts, or be interested in contracts made by their principals, undoubtedly applies to directors of corporations. It is a valuable principle, and ought not to be impaired by any subtle or refined distinctions. Still, the mere fact that the same persons were directors of the corporation which made the lease, and of that which took it, is not of itself sufficient to avoid the contract at the instance of one or more stockholders, against the will of the corporation. That fact alone might entitle either corporation to avoid the lease, but I apprehend it does not give that right to a stockholder."

The principle is here recognized that the majority of the shareholders may ratify a lease made by the directors, and that a minority cannot disaffirm. That, therefore, it must be the majority of the shareholders acting through the corporation who repudiate, and no shareholder has the power to exercise that right against the will of the majority.

The case of The United States Rolling Stock Co. v. The Atlantic & Great Western R. R. Co., 34 Ohio, 450, is relied upon by the defendants' counsel as conclusive upon this point. It seems to be necessary that this case should be referred to at length, as it is claimed to decide; and upon a cursory examination appears to decide much more than was intended by the Court:

"The action below was brought by the plaintiff against the defendant, to recover the sum of $985,934.02, most of which sum was a balance alleged to be due the plaintiff from the defendant for the use of the rolling stock furnished by the former to the

latter from February, 1872, to December 10, 1874, under an express contract. It appears from the record that the plaintiff was incorporated under the laws of New York, on the 31st day of October, 1871, with a board of five directors, empowerd to manage its affairs; and that on December 11, 1871, the defendant was organized as a consolidated railroad company under the laws of New York, Pennsylvania, and Ohio, with a board of thirteen directors; that at the date of the organization of the railroad company the five directors of the Rolling Stock Co., George B. McClellan, Samuel L. M. Barlow, James B. Hodgkins, William Butler Duncan and Lawrence Wells, were elected, and became five of the thirteen directors of the railroad company. That said five persons continued to be the sole members of the plaintiff's board of directors and five of the thirteen members of the defendant's board until the 11th day of December, 1873, and that one or more of said directors of the plaintiff continued to be directors of defendant until the termination of the contract on which suit was brought. It further appears that on November 6, 1871, a provisional contract was entered into by James McHenry, purporting to act for plaintiff, and Leonard J. Woodman, purporting to act for and on behalf of the executive committee of the Atlantic & Great Western R. R. Co., by the terms of which the plaintiff agreed to supply to the defendant, and the defendant to receive, at an agreed monthly rental for the period of seven years from January 1, 1872, the rolling stock mentioned in a schedule thereto annexed.

"On the 19th day of July, 1872, this contract, with a certain modification, was ratified and adopted, by the plaintiff's board of directors, and on August 2, 1872, was, as modified, adopted and confirmed by the defendants' board of directors. It further appears that at the meeting of the defendants' board at which said contract was ratified and confirmed, only eight of the thirteen members were present, two of whom, McClellan and Hodgkins, were the directors of the plaintiff.

"The question presented by the record arises upon the exception to the charge of the Court upon the point of the defendants' right to avoid the contract upon which the action was founded. The rule that an agent or trustee in matters touching his agency or pertaining to his trust, cannot bind the principal or cestui que trust, without his consent, by a contract in which the former is adversely interested, rests upon a very satisfactory foundation, and is supported by a great weight of authority. Wade *v.* Pettibone, 11 Ohio, 57; Morrison *v.* Thompson, L. R. 9 Q. B. 480; 1 Leading Cases in Eq. 210.

"In Story on Agency sec. 210, the rule is said to be founded 'upon the plain and obvious consideration that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence and zeal of the agent for his own exclusive benefit. It

is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interest of his principal as far as he lawfully may.' And in 2 Kent's Com. 618, the same principle is asserted and in the following language: 'An agent acting as such cannot take upon himself at the same time an incompatible duty. He cannot have an adverse interest or employment. He cannot be both a buyer and seller, for this would expose his fiduciary trust to abuse and fraud.' In Bennett ex parte, 10 Ves. 393, Lord Eldon, commenting on a sale of the trust property to the trustee, stated the reason of the rule denying the right of the trustee to buy the trust property to be, 'That it would not be safe, with reference to the administration of justice in the general affairs of the trust that a trustee should be permitted to purchase; for human infirmity will in a very few instances, permit a man to exert against himself that prudence which a vendor ought to exert in order to sell to the best advantage, and which a purchaser is at liberty to exert for himself, in order to purchase at the lowest price. The rule which prevents the agent or trustee from acting for himself in a matter where his interest would conflict with his duty, also prevents him from acting for another whose interest is adverse to that of the principal; and in all cases where, without the assent of the principal, the agent has assumed to act in such double capacity, the principal may void the transaction at his election. No question of its fairness or unfairness can be raised. The law holds it constructively fraudulent and voidable at the election of the principal.' Aberdeen Ry. Co. *v.* Blaikie, 1 Macqueen, H. L. Cases, 461; The York Bldgs. Co. *v.* Mackenzie, 3 Paton, H. L. 378; Bispham's Principles of Eq. 106; 18 Ohio St. 182.

"But does the present case fall withint he operation of this principle? The right to avoid the contract because the agent has a personal interest in its subject-matter adverse to that of the principal, or has assumed an incompatible duty, is one arising in equity for the principal's protection. He may avail himself of the right to avoid the contract, or he may waive it, at his option. That the agent may represent two persons, with their assent, in a transaction relating to or embracing a subject-matter respecting which their interests may be adverse or conflicting, admits of no doubt. In the Adams Mining Co. *v.* Senter, 26 Michigan, 73, upon the question how far the double agency of one affected his relation to his employer or third persons, it was held that where the same person is made the agent of two mining corporations in the same vicinity, and it becomes necessary for one to deal with the other, he must be presumed to have the same power to act for both that he would be possessed of if there were two agents acting separately, and may dispose of the property in the same way; and such double authority would dispense with such formalities as could not be complied with, where one man acts for both companies. The

Court, in announcing its opinion, says: 'The authority of agents, where no law is violated, is as large as their employers choose to make it. There are multitudes of cases where the same person acts under power from different principals in their mutual transactions. Every survey of boundaries by a surveyor jointly agreed upon would come within similar difficulties. There can be no presumption that the agent of two parties will deal unfairly with either.'

"So, where the subsequent assent is given to the acts of the agent the same result follows, that is, if the principal with full knowledge of all the facts affecting his rights ratifies the acts of his agent, the right to avoid the contract or transaction is gone."

The learned Court then points out that dissent must be made within a reasonable time, and that a principal who has an option to avoid or stand by the contract of his agent, is not permitted to wait the issue of events and then adopt or reject the contract as he may think most for his interest, and that an acceptance of the benefits of a transaction imposes the obligation to assume its burdens and operates to confirm it as a whole; but that if the contract in question was absolutely void because agents in common of the two corporations participated in making it, there could be no ratification by acquiescence. The learned Court then calls attention to the fact that at common law a contract between two corporations, having common directors, made by their respective boards, or between a corporation and an individual director, or a firm of which he is a member, is valid, and cites the cases of Foster *v.* The Oxford, etc., Ry. Co., supra; Ernst *v.* Nichols, 6 H. L. Cases, 401; and Murray's Exrs. Case, 5 De Gex, NcNaughten & Gordon R. 746. This is undoubtodly the rule at common law, but it is equally well settled in equity that all such contracts are voidable at the option of the corporation. The learned Court then argues, that conceding the contract was voidable in equity at the election of the company for the want of the presence at that meeting of a quorum of directors who were not directors of the plaintiff, that "it nevertheless appeared that the board was composed of thirteen persons, a clear majority of whom were affected with no incapacity to act for the best interests of the company, and who sustained no fiduciary relation to the plaintiff whatever. This majority possessed amply power to restrain and control the action of the minority, and if the contract was voidable at the option of the company, it had full power to express the company's election, if it saw fit to avoid the contract. The fact that one of the persons composing this majority might vote with those who were members of both boards, and thereby create a majority in favor of the contract, would in no wise affect the validity of the transaction, nor relieve the board from the duty to move in the matter, if they desired the company's escape from liability.

"We have not, upon the most diligent research, been able to find a case holding a contract made between two corporations by their respective boards of directors invalid, or voidable at the election of one of the parties thereto, from the mere circumstance that a minority of its board of directors are also directors of the other company. Nor do we think such a rule ought to be adopted. There is no just reason where a quorum of directors, sustaining no relation of trust or duty to the other corporation are present, participating in the action of the board, why such action should not be binding upon the company, in the absence of such fraud as would lead a court of equity to undo or set aside the transaction. If the mere fact that a minority of one board are members of the other gives the company an option to avoid the contract, without respect to its fairness, the same result would follow where such minority consists of but one person, and notwithstanding the board might consist of twenty or more. In our judgment, where a majority of the board are not adversely interested and have no adverse employment, the right to avoid the contract or transaction does not exist without proof of fraud or unfairness; and hence the fact that five of the defendants' board of directors were members of the plaintiff's board, whatever may have been its effect on the defendants' right to disaffirm or repudiate the contract if exercised within a reasonable time, did not disable the defendant from subsequently affirming the contract if satisfied with its terms, or rejecting it, if not, nor did it relieve it from the duty to exercise its election to avoid or rescind within a reasonable time, if not willing to abide by its terms.

"That it did not do this, nor take any steps towards disaffirmance, but continued to act under it for nearly two years and a half, receiving the rolling stock for the use of which it stipulated and with which it operated its road for the whole of said period, making payments for such, in accordance with the rate fixed by the contract, very clearly appears from the admitted facts."

It will be observed that no question as to a minority of common directors was involved in that case, and the discussion was based entirely upon failure to repudiate within a reasonable time, and in the discussion of the minority question the learned Court overlooked the principle, which seems to me to be well established by authority, as I shall attempt to show hereafter, that the corporation is entitled to all the knowledge and skill which each and every director can bring to bear upon the subject before the directors of such corporation.

The Court further say, that "the instruction given by the Court to the jury as applied to the undisputed facts was therefore erroneous." Why? "Because the jury were told that the fact that the said directors of the plaintiff were five of the thirteen directors of the defendant, with the further fact that two of said five

were two of the quorum of eight directors of the defendant who confirmed the contract, rendered such contract in law invalid and voidable at the election of the defendant, irrespective of the motive of the directors participating. This was intended and understood to mean that such election could then be made, notwithstanding the admitted facts, constituting in law a complete affirmance of the contract." In other words, although the contract was voidable in equity for the reasons given in the instruction above stated, yet it not having been repudiated within a reasonable time that right had been lost. And all that was decided in the above case was that such a contract, although voidable in equity, was valid at law, and unless repudiated within a reasonable time could be enforced.

Attention is also called to Ashurst's appeal, 60 Penn. R. 290, in which it is said:

"I come, then, to consider the facts that the purchasers were the same persons as those who as directors sold, and as stockholders authorized the sale. It is often said, and truly, that the same persons cannot be both buyers and sellers in one transaction. They were not strictly in this. All the purchasers were not directors who made the sale. But I make no account of that. Still, why may not directors of a corporation sell to themselves? Each director has an interest distinct and antagonistic to his interest as a mere man. There is identity of person, but not of interest. There must be many things which directors can do for their individual benefit, which are binding upon a corporation of which they are directors. If they have advanced money, I cannot doubt they may pay themselves with corporate funds. If they have become liable as sureties for the corporation, they may provide for their indemnity. And though ordinarily the law frowns upon contracts made by them in their representative character with themselves as private persons, such contracts are not necessarily void. They are carefully watched, and their fairness must be shown. But I repeat the question, why may not directors sell to themselves in any case? It is because of the danger that the stockholders may suffer, if such sales be permitted, for want of antagonism between the parties to the contract. But such sales are supported in equity where the fiduciary relations of the purchaser have ceased before the purchase, when the purchase was made with full consent of the stockholders, or where stockholders have by their acquiescence debarred themselves from questioning the transaction."

The doctrine here is again enunciated that such contracts are valid in law, and although voidable in equity may be affirmed by actual ratification or acquiescence.

In the case of Bill *v.* The Western Union Telegraph Co. the same distinction is taken, and it is nowhere held that such a contract is not voidable in equity, even if valid at law.

The case of Booth et al. v. Robinson et al., 55 Maryland, 419, it is claimed also decides that a contract is not voidable between corporations because of common directors. That case was an action brought by the stockholders of a corporation against some of its directors who were common directors in another corporation, upon an allegation that they, with an intent to cripple the corporation in which the plaintiffs were stockholders, made certain arrangements with another corporation in which they were directors, and in which the plaintiffs were not stockholders. The corporations were made parties defendant upon an allegation that these directors had control of the corporations, and by means of that control they could frustrate and defeat any attempt to induce the corporation to take action for the redress of the wrongs alleged. The Court in that case say: "In these cases the proper and primary party to complain and call the directors to an account in a court of equity for fraud or breaches of trust in the management of the affairs of the corporation, is the corporation itself, because the duty is owing and the wrong is done directly to the corporation and only indirectly to the shareholders; and, therefore, to enable a shareholder, either for himself alone, or for himself and others, to maintain a bill against directors for such fraud or breaches of trust, he must allege and show not only the violations of duty or breaches of trust on the part of the directors, but that he as a stockholder had been damnified thereby, and that the corporation has failed or refused to take the proper legal steps for the redress of the wrong."

The nature of the action, it will thus be seen was entirely different from that which is now before the Court. It was an attempt upon the part of stockholders to assert their individual rights independent of the corporation, upon the ground of absolute fraud and mismanagement of the affairs of the corporation by certain of its directors. The fact that these directors held also the same offices in the other company, had nothing whatever to do with the cause of action involved, because independent of that fact a cause of action existed, if such fraud and gross mismanagement was shown. It is clearly stated in that case that the fraud must be proven and that mere indiscretion, want of skill or deceit or mistake of judgment in the conduct of the affairs of the corporation, afford no ground of personal liability on the part of directors. The Court, therefore, say that two directors representing both corporations, this fact alone, while it should subject their conduct to rigid scrutiny by the court, does not afford ground of presumption against the legality and fairness of the dealings and transactions between the two companies. In other words, that upon the issue of fraud—actual fraud and gross mismanagement, the fact that these two directors had conflicting interests would be considered in determining that issue, and nothing else was meant by the Court in the use

of this language. The Court then go on and say: "The two companies were certainly competent to contract the one with the other and the two directors whose conduct is in question, were interested in both companies and by their relation to an official position in them, they owed duties and were bound to be faithful alike to both; therefore, while acting within the scope of the affairs delegated to them by the stockholders of the corporation there is no presumption of illegality or unfairness in their dealings and transactions as between the two companies. They were the chosen agents of both, and to be successful in any attempt to impeach the validity of their acts, with a view of making them personally responsible either to the corporation or to the stockholders, there must be distinct charges of misconduct fully supported by proof." Adams Mining Co. *v.* Centre, 26 Mich. 73; U. S. Rolling Stock Co. *v.* Atlantic & Great Western Ry. Co., 34 Ohio St. 450. Thus it will be seen that the Court, in the use of this language, had in mind only the fact, that in order to make trustees personally responsible, it was necessary to prove actual misconduct, and that the mere fact that some of the directors of the two contracting corporations were common directors, did not necessarily establish that proposition. It must be fully supported by proof. And in support of this proposition, are cited the cases to which reference has previously been had—the one of which referred to the fact that an agent might act for both parties where his agency was known and his action approved, and the other that the mere fact that two contracting corporations had common directors did not make their contract void in law but simply voidable in equity, which right might be lost by lapse of time. The Court goes on and says: "This case is altogether unlike that of a trusted agent or director bargaining in a matter of personal advantage to himself individually with the party reposing the confidence in him, and where it is incumbent in him to show that a fair and reasonable use has been made of that confidence, as in the case of the Hoffman Steam Coal Co. *v.* Cumberland Coal and Iron Co., 16 Md. 456; Cumberland Coal and Iron Co. *v.* Parrish, 42 Md. 598; Jackson *v.* Ludeling, 21 Wall, 616; and other cases of that class to which reference might be made. In that class of cases the law proceeds upon the principle of constructive fraud irrespective of fraud in fact; and hence the onus of proof is upon the party seeking to maintain the transaction. But in a case like the present, where the effort is to make the defendants personally liable for alleged injuries occasioned by conduct willfully fraudulent, in intent and purpose amounting to breaches of trust, the proof in support of the allegations must be other than mere constructive fraud or breaches of trust; there must be affirmative proof of the misconduct charged, going to establish the fraud in fact." Therefore, all that seems to be established by the case above cited is that in order to hold direc-

tors personally responsible, affirmative proof of fraud, absolute fraud is requisite. The power of corporations having common directors to loan and borrow money one from the other, and to give and to receive security therefor, is recognized and upheld, the Court, however, not referring to the fact that such contracts, although voidable in equity, cannot be repudiated without the return of the money borrowed and, therefore, the contract is allowed to stand, as there can be no object in entertaining an action for rescission, the borrower having a right upon tender of the money received to get its securities back without the intervention of a court of equity, which is all the relief a court of equity can give.

These cases, therefore, cannot be held to overcome the adjudications of our own State, nor should they be held to have, in the slightest degree, shaken a principle so deeply imbedded in the rules governing the action of trustees with their cestui que trust. In none of the cases has there been any attempt, as far as I have been able to discover, to distinguish between the disqualification of interest, as applicable to contracts between a director and his corporation, and such disqualification is applicable to contracts made between two corporations having common directors, they being treated as resting upon the same basis. It seems to me that it has been conclusively shown by the authorities, both in England and this State, that any contract which may be entered into between a corporation with one of its directors is voidable at the option of the corporation, although it may be entirely valid at law. The question as to what the condition of affairs may be, in case a contract is entered into between two corporations, one or more of the directors of one of which might have been at the time of the contract a director of the other, has not been so distinctly met or disposed of by any adjudications to which I have referred. But the principle seems to me to be the same, as has been already suggested, and the dangers to be overcome and to be met are of an analagous character, and the only rule which can be adopted by the Court in dealing with such contracts is to apply that which has always obtained in the cases of contracts between a director and his corporation.

It may be urged that the position of a director in a corporation does not give him the same degree of personal interest in its success as would be the fact were he simply entering into the contract to be personally benefitted thereby; that he is one of many, his interests are divided with that of the other shareholders, and his influence may be counteracted by his co-directors. But the fact that he has an adverse interest to the one or the other of the corporations is apparent, and that he is attempting to serve two masters is also equally plain. It must necessarily happen, according to the rules which have been laid down by the courts of equity in reference to the action of agents, that he will in nine cases out

of ten serve the interest of the one principal and betray those of the other; and in order to remove persons so situated from all temptation, in order that there may be no uncertainty in the law in reference to such contracts, courts of equity have held that where there is such a conflict of interests between an individual and a corporation, or between corporations having common directors, that the contract shall be voidable as matter of equity without any evidence whatever of misconduct upon the part of the agent or director. If the rule is to be so far relaxed that common directors may participate in the contracts between corporations, or if common directors may allow contracts to be made between the two corporations that they represent, it would present the same field of speculation and the same uncertainty of result, for courts to attempt to investigate the motives of the common directors; to determine the influences which they had upon their associates, or which they failed to exert upon their associates; to determine the fairness and reasonableness of the contract; to investigate all the influences which were at work which led to the entering into the contract, which has been so severely condemned by the cases passing upon the rights of cestui que trusts in reference to contracts made by common trustees. Contracts of this kind would be left involved in a sea of doubt, and a prediction as to the result of an investigation as to their fairness and honesty would be the merest speculation. It was to relieve the courts from such investigations and to let parties understand precisely the ground upon which they stood that the stringent rules in regard to agents and principals were adopted, and the same reasons require that, in order that there may be reasonable certainty in reference to the results to be arrived at in investigating the contracts between two corporations who have common directors and therefore conflicting interests and conflicting duties, the same rule must be necessarily adopted, namely, that at the option of the cestui qui trust, or of the corporation, such contracts may be voided.

It is urged against this rule that if common directors are disqualified from acting so are common shareholders, incompetent to ratify agreements between their companies, and that the holder of one share of stock in each of the companies could prevent any action at a shareholders' meeting relating to the two companies, no matter how advantageous such action might seem to the holders of every other share of stock. I do not say that the disqualification extends to a shareholder. I can see no reason why it should. The disability rests entirely upon the fiduciary relationship. A shareholder is trustee for nobody; he has only his own interests to look after as such shareholder, closely connected as they undoubtedly are in practice with the interests of the other shareholders, but he holds no such fiduciary relation to the corporation as pertains to the office of director, and I think that it is carrying

the rule to a much greater length than the reasons which have given it existence require, and in this respect the New Hampshire case of Pearson *v.* Concord Ry., extends the disqualifications too far and beyond all reason.

This brings us to the consideration of the question, whether this infirmity does exist in the October agreements, a number of uncommon directors sufficient to constitute a majority having voted for them, even if all of the common directors had voted no? No such question as this was presented in the Content case, as it is called, nor was the question of common directors at all discussed.

The general tenor of all the authorities is, that this fact does not cure the infirmity in the contract. It is true that some cases, like those above cited, may be found where such a proposition has been stated; but I can find no adjudication to that effect in any case where the question was directly involved, and where its discussion was necessary to the decision of the case. The foundation of the rule lies in the fact that the corporation, as has been before stated, is entitled to all the knowledge and skill which each and every director can bring to bear upon the subject before the directors of such corporation. This rule is clearly recognized in respect to various Statutory Boards. In order that valid action may be taken by such a Board (unless different provision is made by Statute), all the members of the Board must meet, although a majority may control the action of the Board. The argument being, that the arguments and reasoning of one man of a number may convince, and frequently has convinced, the minds of many associates as to the propriety or impropriety of contemplated action, and whose votes would have undoubtedly been just the opposite of what they were had such member been absent. This was the point upon which turned the decision of the case In re East Norfolk Tramway Co., Law Reports, Chancery Division 5, page 963. There the articles of association provided that no man should be eligible as a director, unless he was recommended to the shareholders by the Board of Directors. Six out of seven of the Directors were present at a shareholders' meeting, at which Mr. Barber was chosen a director, and it was claimed that this was a virtual "recommending" of him. Sir Geo. Jassel, Master of the Rolls, says: "First of all, he was not recommended by the Board of Directors. Six directors out of seven met in a friendly capacity, and for a different purpose, and such a meeeting does not make them a Board of Directors."

* * * * * * *

"It by no means follows that if a board meeting had been summoned, and the seventh had attended, the seven would have come to the same conclusion as the six without him. People are very apt to change their minds when their hear arguments. . . . Then it might well be that the absent director might have known

something against the person proposed, and that if he had stated it to the Board of Directors they would have entirely changed their minds."

Again, in the Aberdeen Ry. Co. case, upon this point, the Lord Chancellor says: "I observe that Lord Fullerton seemed to doubt whether the rule would apply where the party whose act or contract is called in question is only one of a body of directors, not a sole trustee or manager.

"But, with all deference, this appears to me to make no difference. It was Mr. Blaikie's duty to give to his co-directors, and through them to the company, the full benefit of all the knowledge and skill which he could bring to bear on the subject. He was bound to assist them in getting the articles contracted for at the cheapest possible rate. As far as related to the advice he should give them, he put his interest in conflict with his duty, and whether he was the sole director, or only one of many, can make no difference in principle."

In the case of the Imperial Mercantile Credit Association *v.* Coleman, 6 Chancery Appeal Cases, 588, this point is also discussed, and the Lord Chancellor says: "The ordinary operation of the rules of this court lay down firmly that no director of a company can, in the absence of any stipulation to the contrary, be allowed to be a partaker in any benefit whatever from any contract which requires the sanction of a board of which he is a member. The reasons are given fully by Vice-Chancellor Knight Bruce, in Benson *v.* Heathron, 1 Y. and C., ch. 326, cited by the Vice-Chancellor in his judgment, and amount to this: that the company have a right to the services of their directors whom they remunerate by considerable payments; they have a right to their entire services; they have a right to the voice of every director, and to the advice of every director in giving his opinion upon matters which are brought before the board for consideration; and the general rule that no trustee can derive any benefit from dealing with those funds of which he is a trustee, applies with still greater force to the state of things in which the interest of the trustee deprives the company of the benefit of his advice and assistance."

In the case of Paine *v.* Irwin, 16 Hun, 390, which came up on a demurrer before me, and which was affirmed at the General Term, this question was distinctly presented, and in respect to the trustee not having voted at the meeting authorizing the contract, it was said:

"I have not thought it necessary to discuss the question as to the defendant's presence at the meeting at which it was resolved to purchase this property; because his presence or absence at such a meeting would in no manner affect his disability to deal with the corporation. This confidential relation existed, whether he was at the meeting which directed the purchase or not."

In the case of Cumberland Coal Co. v. Sherman, 30 Barb. 553, the Court sets forth with great clearness, the reasons upon which the rule is founded. It says:

"Neither are the duties or obligations of a director or trustee altered from the circumstance that he is one of a number of directors or trustees, and that this circumstance diminishes his responsibility, or relieves him from any incapacity to deal with the property of his cestui que trust. The same principles apply to him as one of a number as if he was acting as a sole trustee. It is not doubted that it has been shown that the relation of the director to the stockholders is the same as that of the agent to his principal, the trustee to his cestui que trust, and out of the identity of these relations necessarily spring the same policy of the law. In the language of the plaintiff's counsel, it is justly said: 'Whether it be a director dealing with the board of which he is a member, or a trustee dealing with his co-trustees and himself, the real party in interest, the principal, is absent, the watchful and effective self-interest of the director or trustee seeking a bargain is not counteracted by the equally watchful and effective self-interest of the other party, who is there only by his representatives; and the wise policy of the law treats all such cases as that of a trustee dealing with himself.'

"The number of directors or trustees does not lessen the danger, or insure security that the interests of the cestui que trust will be protected. The moment the directors permit one or more of their number to deal with the property of the stockholders, they surrender their own independence and self control. If five directors permit the sixth to purchase the property intrusted to their care, the same thing must be done with the others if they desire it. Increase of the number of the agents in no degree diminishes the danger of unfaithfulness.

"Whichcote v. Lawrence, 3 Vesey, 740, was a case of several trustees. In this case Lord Loughborough says: 'There was more opportunity for that species of management which does not betray itself much in the conduct and language of the party, when several trustees are acting together. I am sorry to say there is greater negligence where there is a number of trustees.'"

The fact of the importance of individual influence, was recognized in the judiciary amendment to the constitution, wherein it was provided that a judge could not sit in an appellate court in review of his own decision, although he might be only one of seven composing the Court.

In Duryea v. Traphagen, 84 N. Y. 652, a judgment of the General Term was reversed on the ground that Judge Brady improperly sat in review of his own decision, although he was only one of the three judges in the General Term, and Judges Davis and Barrett (the other judges present), constituted a good Court.

In Regina v. Justices, 6 Adol & Ellis, New Series, 753, it was

held that the fact that an interested magistrate sat in Court, vitiated the decision, even when there was a majority in favor of the decision without counting his vote.

Lord Denman says: "It is contended that, as the majority, without reckoning his vote, was in favor of the confirmation, the order is not vititated. But after making every impossible deduction from the strength of my opinion, in deference to that of my brother Patteson, still, in my judgment, a decision is vitiated by any one interested person taking part in it. We cannot enter into an analysis of the different motives which may have produced the decision; it is enough to say that a single interested person has formed part of the Court."

Patteson, J.—"I suppose that, in Regina *v.* The Cheltenham Commissioners, 1 Q. B. 467, I was not satisfied that the interference of a single interested party was sufficient to invalidate the decision; in fact, the interference of the interested parties did there turn the majority; and I suppose that I was satisfied with limiting my decision to that ground. But, on consideration, I think this is unsound; I think that it is very dangerous to allow an interested person to join, whether the majority turn on his vote or not. The magistrates discuss the question among themselves; and it is impossible to say what effect that discussion may have on the decision. The real question is, has an interested person taken any part at all?

Coleridge, J.—"I will merely add, as I was not present at the decision of Regina *v.* The Cheltenham Commissioners, 1 Q. B. 467, that I agree in the view now taken by my Lord and my brother Patteson. Whether there is a properly constituted Court, is a question which must be prior to the decision. My brother Patteson does not appear to have differed very decidedly, in Regina *v.* The Cheltenham Commissioners, from our present view; he there intimates that a magistrate who knows that he is interested, and still takes part in the discussion, is not justified in saying that, because so many other magistrates were present, he could not have influenced the decision."

Wightman, J.—"I agree, and I meant, in Regina *v.* The Cheltenham Commissioners, to rest upon the principle on which we are now deciding; that we cannot enter into a discussion as to the extent of the influence exercised by the interested party."

In our Courts, the disqualification of interest is as strictly upheld. A judge, the holder of one share of stock out of one million shares in a corporation is just as certainly disqualified to sit in a cause in which that corporation is interested, as though he held one thousand shares. It is not the amount of the interest which works the disqualification; it is the existence of any interest, however slight.

The rule, therefore, seems to be clearly established, that the

question of minority cannot be considered in determining the right in equity to avoid a contract. The presence of one disqualified director is just as fatal to action which cannot be repudiated, as the existence of a dozen. It being impossible to ascertain the amount of influence which each director exerts, or which he fails to exert in opposition to action in which he is interested, the only rule which can be adopted or which can be applied with any certainty is, that if there is even one director who is disqualified, the whole action of the board is subject to repudiation.

But it is urged, that the Metropolitan shareholders knew that at the time Messrs. Garrison, Navarro and Porter were elected directors of the Metropolitan Co. they were also directors of the Manhattan Co.

I have been unable to find proof of any such knowledge, but if they had, I do not see how it can affect the question under consideration.

There is no proof that the shareholders of the Metropolitan Co. had any reason to suppose that any new agreements were to be made between the Metropolitan and the Manhattan companies, by which virtually a new lease was to be made. There is nothing to show that such shareholders in any degree contemplated the making by this Board of permanent changes in the terms and conditions by which the Manhattan Co. was to hold their property. If the shareholders, knowing that new arrangements would have to be made between the Manhattan Co. and the Metropolitan Co., had elected Directors, some of whom they knew to be Directors of the Manhattan Co., then the case presented would have been similar to those cited. But this element of knowledge upon the part of the shareholders of the Metropolitan Co., that the lease was to be substantially altered to the advantage of the Manhattan Co., is entirely absent in the case at bar. They knew nothing of it. They elected a board simply to manage the affairs of the Metropolitan Co. under the lease, affairs which were of the most limited nature and not to radically change the whole basis upon which the shareholders had assented to the lease to the Manhattan Co. After the leases were made then all antagonism of interest between the companies had ceased, no more contracts or agreements were to be made between them, and common directors were, therefore, entirely proper. But when unexpected contingencies arose, by which the sharp conflict of interest which existed before the leases was revived, a state of affairs was presented which had not been anticipated by the shareholders; and it is fair to assume, if they had been foreseen, such shareholders would have preferred directors who had no divided allegiance, and whose sole interest would have been to maintain the rights of their company. In order that an agent or trustee may act for two principals, the principals must each know not only that he is the agent of each, but

also that action by the agent is contemplated, in which such agent is to represent the hostile interests of both principals, and if such knowledge is not shown the principal may repudiate. None of the cases have gone further than this.

I have, therefore, been lead to the conclusion, that the directors had no power to modify the leases of May 20th, 1879, in the manner that they did by the October agreements, without the assent of the stockholders; and that even if they had such power, that the presence of Directors in the Metropolitan Board, who were also Directors of the Manhattan Co. at the time of the adoption of these October agreements, gave either company the right, in equity, to repudiate those contracts within a reasonable time, although the contracts may have been perfectly valid at law.

The Metropolitan Co. certainly did repudiate these agreements within a reasonable time, having commenced this action within one month after the shareholders of that company had an opportunity to elect a new board of directors, who could take action in the matter.

The plaintiff, therefore, is entitled to a judgment relieving all the parties in this action from the October agreements, upon making such restitution as is suggested in a former portion of this opinion.

It has been said that this conclusion, if reached, would cause great confusion and conflict of interest among a vast number of railroads in this country, so many of whom have common directors and also traffic arrangements with each other. This evil is not so great by any means as has been depicted. Agreements of this character are not void, but simply voidable, and if the corporation wishes to avoid them, as has been shown, it must act within a reasonable time. If the shareholders are dissatisfied with the acts of their directors, they must repudiate them within a reasonable time, which in most cases would be held to mean at the next meeting for the election of directors, when they can elect a new board, who can take the necessary action to annul the voidable contract; and it must, therefore, be the dissatisfaction of the majority of the shareholders, and not that of a minority, which can call the power into operation. If the shareholders renew the terms of office of the directors who have made the voidable contract, or if they take no action showing plainly their dissent, the contract will become binding by acquiescence. As in most corporations boards of directors are elected by the shareholders annually, the right to annul can seldom exist for more than one year. Thus it will be seen that there can be but few cases in which the decision of these questions can affect past action, whatever influence it may have in shaping the proceedings of trading corporations hereafter.

Although it is not necessary for me to decide the question of

fact, in reference to Mr. Stout's vote, in view of the conclusion to which I have come above, yet, in order that, if I should have been mistaken in my view, the whole case may be disposed of by the appellate court, I will briefly state why I shall find that Mr. Stout voted in the affirmative, on the 22d of October, at the meeting of the board of directors of the Metropolitan Co.; and for the purposes of this question, I am willing to concede that every director present supposed that he voted no.

I am satisfied from the evidence, that not one of the members of the board present at that meeting remembers the physical fact of hearing Mr. Stout's voice when he voted. I do not think Mr. Stout himself recollects the precise act of voting. It is not a circumstance which he would be likely to recollect. It was at the time, probably, not thought of much consequence how he voted. He was, if he voted with Mr. Kneeland, in a hopeless minority, and he undoubtedly thought it was not of much consequence how he voted, as is shown by his action at the next meeting on the 24th of October. The minutes record his vote as in the affirmative, and at the next meeting of the Board, held two days after, when these arguments are being canvassed and all sorts of motives impugned to their supporters, these minutes, in which his vote is recorded in the affirmative, are read in his presence and that of Mr. Kneeland, the latter of whom had voted "no," and they are approved unanimously. It is not claimed that he or anybody else then voted no. It seems to me that after Mr. Stout has allowed those minutes to be approved, it is too late for him now to say that they are incorrect. He has voted that they are correct. There is no claim that the minutes of the meeting of October 24th are incorrect. They state the true facts, and as it seems to me under these circumstances, that it would take not only more than two, but more than half a dozen witnesses to prove the record of that vote false, the party himself having voted it correct.

I am referred by the counsel for the plaintiff to the case of Hun *v.* Cary, 59 How. Prac. p. 430, as to the effect of a record of a vote in the minutes of a board. The learned justice who wrote the opinion in that case fell into an error as to the effect of the testimony of a party. In that case one of the questions submitted to the jury was, whether the defendant Smith was present at a meeting of directors. The Court say: "There was no evidence, other than the minutes, of his attendance at the meeting which authorized the purchase. He, himself, denied such attendence in the most positive terms, and asserted his entire ignorance of the transaction until after it was closed. We think this entitled Mr. Smith to a dismissal of the complaint. There was no conflict of evidence and nothing to go to the jury. If the secretary or any one else had testified to Mr. Smith's attendance, that, of course, would have

involved a conflict. But the prima facie evidence, made by the secretary's unsworn declaration contained in the minutes, was absolutely overthrown by Mr. Smith's testimony; that is, unless such testimony is to be disregarded. But it cannot be disregarded by either Court or jury, for it was not impaired on cross-examination, nor was Mr. Smith's credibility in anywise impeached or affected."

There is no such rule governing the evidence of a party. The evidence of a party may be disregarded by a jury or a Court trying questions of fact, although it may in no wise be impeached or affected; a different rule obtaining, however, in respect to the evidence of disinterested witnesses. Lesser *v.* Wunder, 9 Daly, 70; Nicholson *v.* Connor 8 Id. 212; Elwood *v.* W. U. Tel. Co. 45 N. Y. 549; Hodge *v.* City of Buffalo, 1 Abb. N. C. 356; Kavanagh *v.* Wilson, 70 N. Y. 129.

But in the case at bar, we have the positive evidence that Mr. Stout was present at the meeting of October 24th, and that the minutes of the previous meeting were read in his presence and his hearing, and that such minutes were approved without any dissent whatever.

If the records of the proceedings of corporations are to be thus lightly regarded, then no man can be safe in dealing with a corporation. It is impossible for a stranger to prove anything about the minutes; and to say that they can be impeached after they have been regularly approved, by the testimony of the very men who sat by and allowed their approval, would be opening the door wide for the gravest perjury and fraud.

In the case of Ashurst *v.* Mason, 20 Eq. Cases 225, Vice-Chancellor Bacon says: "It would be in the highest degree dangerous to permit directors or other persons having the management of companies to say when any particular incident arises or there comes to be a pinch upon it. At that moment my thoughts were elsewhere! I do not hear it! In fact I was thinking of something else!"

Stout heard and approved, and now he cannot be allowed to say that he did not.

Therefore, notwithstanding the fact that the learned counsel for the plaintiff believes it to be impossible for the Court, on the evidence, to find that Mr. Stout voted aye, I must find, according to every rule of evidence, and according to my own conviction, founded upon the evidence, that he did vote "Aye." Mr. Stout's excuse that he was not permitted to see the minute books, is too flimsy to need much comment. He did not try to see them, and, as far as I know, there was no reason why he should have done so. Even if his vote was wrongly recorded, if his evidence is to be believed, he had no reason to suspect it. His lame attempt to find what he believed to be a necessary excuse for not examining the

books, showed a disposition to rely, where he deemed it important, upon the imagination rather than upon the recollection.

The enormous length of this opinion certainly needs some apology; but I have in vain endeavored to condense it. It has frequently been necessary to make long quotations from cases cited, because it seemed impossible otherwise to present the precise attitude of the Court toward the subject under discussion.

I have deemed it proper, in view of the large interests involved, and the magnitude of the questions to be disposed of, and the divergent views entertained by the eminent counsel engaged in the cause, to consider all the questions involved at much greater length than was perhaps, necessary, because I did not desire that there should be any misunderstanding as to the grounds upon which my decision was based.

After a most laborious and critical examination of all the principles and authorities to which my attention has been called, or which I could find, I have satisfied my own mind, that the conclusions to which I have arrived, are those which must be reached by every impartial mind, upon a careful examination of the questions involved in this action, and that they best accord with those great principles of equity, by which the injustice and hardships of the strict letter of the law are remedied.

Explanatory Remarks.—We trust that we need make no apology to our readers for consuming so many of our pages by the publication of the foregoing case. Although the opinion is of an inferior court only, the questions involved were of such great and general interest, the amount in dispute so large, the counsel retained so eminent, and the opinion of the court so elaborate, learned, and exhaustive that we have concluded it to be our duty to publish. We are informed that the opinion is considered so conclusive by the parties to the cause that no appeal will be taken. The case therefore has fully the weight of a court of appeals decision and in addition may be regarded as having the tacit acquiescence of the learned counsel on both sides.

Judge Van Brunt has in his opinion collected almost all the authorities bearing on the various questions involved. We present our readers, however, with a collection of a few other leading cases on these points. We also refer our readers to the same case when in the United States Circuit Court sub nom. Flagg v. Manhattan Ry. Co., 4 Am. & Eng. R. R. Cas. 140.

Powers of Board of Directors.—The directors of corporations have generally no authority to alienate or otherwise part with the property of the corporation essential to the carrying on of its business. Abbot v. American Hard Rubber Co., 33 Barb. 587; Penobscot, etc., R. Co. v. Dunn, 39 Me. 587; Bedford, etc., R. Co. v. Bowser, 48 Pa. St. 29; Burke v. Smith, 16 Wall. 395; White Mountain R. R. Co. v. Eastman, 34 N. H. 124; Burke v. Smith, 16 Wall. 395; Bank v. St. John, 25 Ala. (N. S.) 266; Alford v. Miller, 32 Conn. 243.

Nor can directors of themselves make any great or material change in enlargement of corporate powers or purposes. Marlborough Mfg. Co. v. Smith, 2 Conn. 579; Railway Co. v. Allerton, 18 Wall. 233. But see State v. Adams, 44 Mo. 570; Dayton, etc., R. Co. v. Hatch, 1 Disn. 84.

See also as to the powers of directors the following authorities. Ricord *v.* Central Pac. R. Co., 2 Am. & Eng. R. R. Cas. 394; Hodder *v.* Kentucky, etc., R. Co., 2 Am. & Eng. R. R. Cas. 640; Flagg *v.* Manhattan R. Co., 4 Am. & Eng. R. R. Cas. 140; Boardman *v.* L. S. & M. S. R. Co., 4 Am. & Eng. R. R. Cas. 265; International & Gt. N. R. Co. *v.* Bremond, 4 Am. & Eng. R. R. Cas. 308; Elkins *v.* Camden & Atlantic R. R. Co., 9 Am. & Eng. R. R. Cas. 590; Thomas *v.* Citizens R. Co., 11 Am. & Eng. R. R. Cas. 306.

Contracts of Directors with Corporation.—It is very clear that a director in a corporation cannot contract with it for his own benefit and claim that such a contract is binding. It is voidable at the election of the stockholders. European, etc., R. Co. *v.* Poor, 59 Me. 277; Cumberland Coal Co. *v.* Sherman, 30 Barb. 553; Aberdeen Ry. Co. *v.* Blaikie, 1 Macqueen H. L. Cas. 461; Flint, etc., R. Co. *v.* Dewey, 14 Mich. 477; Linder *v.* Carpenter, 62 Ill. 399; Ogden *v.* Murray, 39 N. Y. 202; Pacific R. Co. *v.* Seely, 45 Mo. 212; Great Luxembourg Ry. Co. *v.* Magnay, 25 Beav. 586; Paine *v.* Lake Erie & Louisville R. Co., 81 Ind. 288; Davenport Bank *v.* Gifford, 47 Iowa, 575; Drury *v.* Cross, 7 Wall. 299; Mahoney Mining Co. *v.* Bennett, 5 Sawy. 141; Simons *v.* Vulcan Oil Co., 61 Pa. St. 202; Bradbury *v.* Barnes, 19 Cal. 120; Ward *v.* Salem St. R. Co., 108 Mass. 332; Graham *v.* L. C., etc., R. Co., 1 Am. & Eng. R. R. Cas. 416; Wardell *v.* Union Pac. R. R. Co., 1 Am. & Eng. R. R. Cas. 427; Barnes *v.* Brown, 2 Am & Eng. R. R. Cas. 638; Duncomb *v.* N. Y. & N. H. R. R. Co., 4 Am. & Eng. R. R. Cas. 293; s. c., 13 Am. & Eng. R. R. Cas. 84; Michigan Air-Line R. R. Co. *v.* Mellon, 5 Am & Eng. R. R. Cas. 245; Little Rock, etc., R. Co. *v.* Page, 7 Am. & Eng. R. R. Cas. 36; Houston & Texas Central R. Co. *v.* Van Alstyne, 9 Am. & Eng. R. R. Cas. 686; Addison, et al. *v.* Lewis et al., 9 Am. & Eng. R. R. Cas. 702.

Such Contracts Voidable.—Such contracts are not void but merely voidable at the option of the stockholders. Ashurst's Appeal, 60 Pa. St. 291; Chester *v.* Dickerson, 54 N. Y. 1; Getty *v.* Devlin, 54 N. Y. 403; Barton *v.* Plank-road Co., 17 Barb. 397; Stark Bank *v.* U. S. Pottery Co., 34 Vt. 144; Hoffman Coal Co. *v.* Cumberland Coal Co., 16 Md. 456; Hotel Co. *v* Wade, 107 U. S. 13; Jones *v.* Arkansas, A. & M. Co., 38 Ark. 17. But see Tuscaloosa Mfg. Co. *v.* Cox, 68 Ala. 71.

Liberal View of Such Contracts.—The most liberal view of the capacity of directors to contract with the corporation is taken in the following cases. Smith *v.* Lansing, 22 N. Y. 526; Whitwell *v.* Warner, 20 Vt. 425; Buell *v.* Buckingham, 16 Iowa, 284; Merrick *v.* Peru Coal Co., 61 Ill. 472; Stratton *v.* Allen, 16 N. J. Eq. 229; Van Hook *v.* Somerville Mfg. Co., 5 N. J. Eq. 137, 633; Sims *v.* Brooklyn St. R. R. Co., 4 Am. & Eng. R. R. Cas. 132; Claflin *v.* S. C. R. R. Co., 4 Am. & Eng. R. R. Cas. 231.

Contracts Between Boards Having Members in Common.—A board of directors of one corporation some of whom are also members of the board of another corporation cannot enter into a contract with such other board so as to bind the respective corporations. Abbot *v.* American H. R. Co., 33 Barb. 578; St. James' Church *v.* Church of the Redeemer, 45 Barb. 356; Polar Star Lodge *v.* Polar Star Lodge, 16 La. Ann. 76. San Diego *v.* San Diego, etc., R. Co., 44 Cal. 106; Bill *v.* Western Union Tel. Co., 16 Fed. Rep. 14; Meeker *v.* Winthrop Iron Co., 17 Fed Rep. 48; Pearson *v.* Concord R. Corp., 13 Am. & Eng. R. R. Cas. 102.

MAPLE
v.
CINCINNATI, HAMILTON AND DAYTON R. R. CO.

(*Advance Case, Ohio. November* 20, 1883).

A judgment against an agent for a fraud committed while acting within the scope of his agency, on which no collection or payment has been made, is no bar to an action against the principal for the same fraud.

In such a case the fact that the principal was wholly ignorant of the fraud, is immaterial.

If the petition properly states the cause of action, and avers that the fraud was not discovered until within four years before the suit was begun, an answer charging that the cause of action did not accrue within four years before suit because the fraud was not committed within said time, is insufficient.

ERROR to the District Court of Putnam County.
Cunningham & Brotherton for plaintiff in error.

GRANGER, C. J.—Maple's petition in the common pleas averred that one John D. Gennett, as agent for the Cincinnati, Hamilton & Dayton R. R. Co., at times between January 14, 1870, and April 5, 1876, collected from him, on freight bills of the company, $307.80 more than was due thereon; that the company, by said agent, "fraudulently over-charged above the regular and special rates for such freight, all without the knowledge and consent of the said plaintiff, by adding a percentage of pounds in weight to the bill presented to the plaintiff, in excess of the true weights upon the books of said company, all of which was fraudulently done," and "that he never had any knowledge of said fraud until the month of April, 1876." The action was begun September 30, 1878.

The second, third and fifth defenses in the answer as amended read as follows:

"2. Said defendant for further defense says, that the said causes of action in the said plaintiff's petition set forth did not accrue to the said plaintiff against the defendant within fours years next before the commencement of this action. Wherefore the same is barred by the statute of limitation in that behalf, in this that its frauds complained of, if committed by said agent, were committed by him as such agent at a time then four years prior to the commencement of this action in this court.

"3. Said defendant further answering says that said plaintiff heretofore, to wit. at the September term, 1876, of the Court of Common Pleas of Putnam County, Ohio, recovered a judgment

against the said J. D. Gennett upon proceedings therein before had in said court in a certain action wherein said Simon Maple was plaintiff, and J. D. Gennett was defendant, and which said judgment was for the sum $387.80 principal and —— dollars interest and costs of suit, and said defendant avers that said judgment so rendered was for the same subject-matter and cause of action as the first cause of action in the plaintiff's petition herein set forth. That said judgment remains in full force and effect, wherefore said plaintiff has no right to have or maintain his suit against the said defendant upon said first cause of action.

"5. That said defendant had no knowledge of any charges made by said J. D. Gennett in excess of the regular rates of freight, and collected by him, as charged in the petition herein, and the same was within the authority or consent of the said defendant, nor did the said defendant ever receive any portion of the said excessive charges, or in any way receive any benefit therefrom, or ratify the same, but on the contrary was entirely ignorant of any acts of the said Gennett in regard to such overcharges in excess of the regular rates for freight, and never in any way ratified or accepted the same or any part thereof. Wherefore the said plaintiff should not have or maintain his said action against said defendant.

To each of said defenses the plaintiff demurred. The common pleas overruled all the demurrers, and gave judgment for the defendant. The plaintiff excepted, and asked the district court to reverse the judgment. As that court affirmed the common pleas, he now asks the reversal of both courts.

The petition contained other causes of action, and the answer to other defenses, but we notice only the fact, that the fourth defense raises the same question as the third, although pleaded to other causes of action, a demurrer to it was also overruled."

The second defense says that the cause of action did not accrue within four years because the fraud was not committed within four years. This mode of putting it admits the truth of the averment in the petition that the fraud was not discovered until April, 1876. As we think the statute did not begin to run against Maple until he had discovered the fraud, the plea was not broad enough to cover the case stated by the petition, and the demurrer to it should have been sustained.

The third defense presents an interesting question. In presenting and collecting the freight bills Gennett acted "within the scope of his authority." The company held him out to its customers as its representative in the matter. So long as the bills he presented did not by the weights or prices noted therein furnish fair reason to question their truth, a customer of the company had full right to rely upon them as being the demands of the company upon him. On these pleadings we must presume that the bills gave no indication of the fraud. This defense admits that the fraud was the act

of the company by its agent. If they conspired together to commit the fraud they were joint tort feasors; could be sued jointly or severally. In such a case a judgment, without satisfaction, against one, could not be pleaded in bar by the other. Is the rule different because the company was ignorant of the fraud, and is liable only because Gennett was acting within the scope of his authority? Was Maple bound to elect between agent and principal, and having carried his election to judgment against Gennett, did he thereby release the company?

No case precisely in point has been cited, and we have found none.

We are referred by counsel for the company to Priestly v. Fernie, 3 Hurlstone & Coltman Ex. 997; Patterson v. Gandesgrein, 15 East, 62; Jones v. Ætna Ins. Co., 14 Conn. 501; Meeker v. Claghom, 44 N. Y. 349; Seelen et al. v. Ryan & Co., 2 Cin. Sup. Ct. Rep. 158, and a case in 1 Disney.

The case in Disney gives no aid here. The one in Cin. Rep. decides that the principal and agent were not jointly liable in that suit, and required the plaintiff to elect which one he would pursue in that action, so that the other might be stricken out. The other cases cited were suits upon contracts so made by the agent that the contractee might elect whether the agent, or the principal, should be considered the party with whom he had a contract; and the courts held, that, having carried the election as far as a judgment, the creditor had fixed the contract, and the parties thereto, permanently. Bramwell, J., in the case in 3 H. & C. 977, places his decision upon the ground just stated, and upon the additional consideration that the judgment against the agent altered the situation of the principal.

Gennett has no right to sue the company because of Maple's judgment against him. He can base no action upon the result of his own wilful fraud.

We are also cited to Wharton on Agency and Agents, section 473. The author cites Priestly v. Fernie, above referred to, for the rule he states, but adds "there is much reason for the position that the mere taking judgment against the agent under such circumstances (as in the case cited) should not, when the judgment is unsatisfied, extinguish the debt." The case before us presents stronger reasons than the one referred to by Wharton for holding that the liability of the principal continues. Unless Maple's recovery against Gennett affected the rights of the railway company we can see no reason for holding that recovery a bar in its favor. So long as Gennett wholly fails to pay that judgment; so long as Maple makes no collection thereon, Gennett must remain liable to make good to the company the damage occasioned by his misconduct as its agent. Nothing but satisfaction by him, or by his property, or the statute of limitations, can release him without the con-

sent of his principal. We hold that the demurrer to this defense should have been sustained.

The text-books—Story on Agency, section 452; Addison on Torts, vol. 2, section 1197—agree that when the agent acts "within the scope" of his agency, the facts that the principal was ignorant of the fraud; did not receive any profit therefrom, and never ratified it, do not relieve him from liability for the fraud. The fifth defense was therefore insufficient.

Judgments below reversed; demurrers to second, third, fourth, and fifth defense sustained, and cause remanded.

Liability of Principal for Fraud of Agent.—A principal is ordinarily liable for the fraud or deceit of his agent. Bennett *v.* Judson, 21 N. Y. 238; Mundorff *v.* Wickersham, 63 Pa. St. 87; Concord Bank *v.* Gregg, 14 N. H. 331; Crans *v.* Hunter, 28 N. Y. 389; Crump *v.* U. S. Mining Co., 7 Gratt, 352; New York & New Haven R. R. Co. *v.* Schuyler, 34 N. Y. 30; Law *v.* Grant, 37 Wisc. 548; Tagg *v.* Tennessee Nat. Bank, 9 Heisk. 479; National Life Ins. Co. *v.* Minch, 5 Thomp. & C. 545; Upton *v.* Tribilcock, 91 U. S. 45; Eilenberger *v.* Protect. Mut. Fire Ins. Co., 89 Pa. St. 464.

As to whether an action sounding in tort will lie in such case against the principal the authorities are not harmonious. Udell *v.* Atherton, 7 H. & N. 172; Barwick *v.* English Joint Stock Bank, L. R., 2 Exch. 259; Addie *v.* Western Bank of Scotland, L. R., 1 Hof. L. S. & D. 145.

The better opinion is that the action will lie. Swift *v.* Winterbotham, L. R., 8 Q. B. 244; Locke *v.* Stearns, 1 Metc. 560; Durst *v.* Burton, 47 N. Y. 167.

At least if the principal has adopted the benefit of the agent's act. Mackay *v.* Commercial Bank, 30 L. T. (N. S.) 180. But see Miller *v.* Wild Cat, etc., Co., 52 Ind. 1.

Missouri Pacific Ry. Co.

v.

Stults.

(*Advance Case, Kansas. April* 1, 1884.)

A local station agent has no authority generally to contract to furnish cars to shippers at stations other than that at which he is stationed. Agency cannot be proved by oral declarations of the supposed agent.

Error from Miami county.

W. A. Johnson, for plaintiff in error.

W. H. Browne, for defendant in error.

Valentine, J.—The plaintiff in error, the Missouri Pacific Ry. Co., was defendant in the court below, and the defendants in error, Stults and Kevswiender, were plaintiffs in the court below; and the principal question involved in the case in the court below was

whether the defendant entered into a special contract with the plaintiffs to furnish the plaintiffs two stock cars, of certain dimensions, at Louisburgh, Miami Co., Kansas, on March 3, 1883. Judgment was rendered in favor of the plaintiffs below and against the defendant below, and the defendant below (as plaintiff in error) now seeks to have such judgment reversed.

We think the plaintiffs below tried their case on a wrong theory—upon the theory that the defendant below was liable for everything said or done by any of its employes, whether within the line of their particular duties or not. The plaintiffs below introduced evidence tending to show that the plaintiffs entered into a contract with the local station agent of the railway company at Paola, Kansas, to furnish the said two cars to the plaintiffs at Louisburgh, Kansas. The plaintiffs also introduced evidence of the oral statements of the station agent at Paola, to prove that he had ordered the cars by telegraph, to be furnished by the station agent at Louisburgh. The plaintiffs also introduced evidence of the oral statements of the supposed agent at Louisburgh, to prove that he was in fact the agent of the railway company at Louisburgh. The plaintiffs also introduced evidence showing the oral statements of the conductor, engineer, fireman, and brakeman on a certain train belonging to the defendant, to prove that the cars might have been furnished by the railway company to the plaintiffs just as well as not. All the foregoing evidence was incompetent. It cannot be presumed or supposed, in the absence of evidence, that a local station agent along the line of a railway has any general authority to contract for furnishing cars to shippers at other stations than his own. Wood *v.* C., M. & St. P. Ry. Co., 59 Iowa, 196; s. c., 6 Am. & Eng. R. R. Cas. 314; and no evidence was introduced tending to prove that the station agent at Paola had any such authority; but, on the contrary, evidence was introduced showing that he had no such authority. Nor can agency be proved by proof of the oral declarations of the supposed agent himself; and all the other oral declarations and statements of the various witnesses not made under oath, and not within the lines of their particular duties, were incompetent. Railway companies are not responsible for the declarations or admissions of any of their servants beyond the immediate sphere of their agency, and during the transaction of the business in which they are employed. Greenl. Ev. § 114*a*.

The judgment of the court below will be reversed, and cause remanded for a new trial.

See Harrison *v.* Missouri Pac. R. Co., 7 Am. & Eng. R. R. Cas. 382; Louisville. etc., R. R. Co. *v.* Henly, 12 Am. & Eng. R. R. Cas. 301.

CONLON

v.

EASTERN R. R. CO.

(135 *Massachusetts Reports.*)

A railroad corporation made a contract with a person to build a culvert under a highway alongside of its railroad. By the terms of the contract, the corporation furnished a derrick for use in the work. The derrick, while in use in the highway, fell, in consequence of the parting of a guy, which was old and obviously defective when the derrick was delivered by the corporation to the contractor. By the fall, the plaintiff, who was not a servant of the corporation or of the contractor, was injured. *Held*, that these facts would warrant the jury in returning a verdict for the plaintiff against the corporation.

TORT for personal injuries. Answer, a general denial. Trial in this court, before W. Allen, J., who reported the case for the determination of the full court, in substance as follows:

The plaintiff offered evidence tending to show the following facts: In October, 1878, one James Dean was under contract with the defendant to build, and was building, a culvert under Franklin Street, in the town of Malden, the defendant by one term of the contract, which was not in writing, agreeing to furnish, and in fact furnishing, a derrick and tools, and the necessary stone. Franklin Street crosses the defendant's railroad at a right angle, and the culvert was building over a watercourse that ran alongside of, and nearly parallel to, said railroad, and under the street. In the course of the work the plaintiff, who was in the employ of the town of Malden, was engaged in damming up said watercourse; and, while so engaged, was injured by the fall of the derrick so in use by Dean. The cause of the fall of the derrick was the parting of a guy, which guy was old and worn, and obviously defective and unfit for use, and was so when delivered by the defendant to Dean. At the time of the accident, the derrick was erected on the north side of the railroad, on Franklin Street. The broken guy was replaced by a sound one furnished by the defendant.

Upon the conclusion of the plaintiff's testimony, the defendant contended that these facts, if proved, were not sufficient to sustain the plaintiff's case; and asked the judge to rule accordingly. The judge declined so to rule, and ruled that the evidence was sufficient. The defendant offered no testimony. The jury returned a verdict for the plaintiff, in the sum of $3,150; and the defendant alleged exceptions.

R. Olney and S. Butler for the defendant.

L. M. Child and T. E. Barry for the plaintiff.

C. ALLEN, J.—By the true construction of the report, the jury were warranted in finding that the defendant furnished the derrick, to be used, as it was actually used, in a particular work. In point of fact, it was unfit for use. The contractor, Dean, ought to have discovered its unfitness, but perhaps did not. However this may have been, the defendant would be responsible for the natural consequences of its use in the manner in which the defendant contemplated that it should be used. There is nothing to show that Dean used it otherwise than as the defendant expected that he would use it. The defendant is responsible for the consequences of what it intended to have done. Whether the injury to the plaintiff was a natural and probable consequence of the defendant's neglect, was for the jury.

Judgment on the verdict.

See Hughes v. Cincinnati & Springfield R. R. Co., and note, infra.

HUGHES
v.
CINCINNATI AND SPRINGFIELD RY. CO.

(*Advance Case, Ohio. November* 13, 1883.)

In respect to the liability of an employer for the negligence or misconduct of an employee, whether agent, servant, or independent contractor, the law makes no distinction between natural persons and corporations.

A corporation organized for the purpose of constructing and operating a railroad, having acquired its right of way by the exercise of the power of eminent domain, or otherwise, may contract with another person for the construction of the whole or any part of the road, without retaining the right to control the mode or manner of doing the work; and in such case the corporation is not liable to third persons for an injury resulting from the carelessness or wilful act of the contractor.

But if the corporation retain control over the mode and manner of doing the work, the relation of independent contractor does not exist, and the employer is liable for an injury to third persons from the carelessness or wilful wrong of the contractor while engaged in the performance of the work.

A right reserved in the contract, on the part of the railroad company, to direct as to the quantity of work to be done, or the condition of the work when completed, is not a right to control the mode or manner of doing the work, within the rule above stated.

When an employer retains control over the mode and manner of doing a specified portion of the work only, and an injury results to a third person from the doing of some other portions of the work, the contractor alone is liable.

The rule of non-liability on the part of the employer for the wrong of the contractor, applies to contracts in respect to real estate as well as movable property, except, that owners of real estate cannot relieve themselves for

liability, through the intervention of a contractor, for the erection of a nuisance; nor for an injury to third persons, necessarily or naturally resulting from doing the work in the manner it was contracted to be done.

ERROR to the Superior Court of Cincinnati.

Mrs. Hughes, her husband joining, brought her original action against the Cincinnati & Springfield Ry Co., for that, in constructing its railroad through her lands, the defendant had wrongfully piled large quantities of waste dirt upon her arable lands not embraced within the right of way, whereby the lands so covered with the waste dirt became untillable and wholly worthless, to her great damage, etc.

An issue of fact having been joined, a jury was impanelled and the plaintiff offered testimony. After the plaintiff closed her testimony, the court, on motion of defendant, directed the jury to return a verdict for defendant, which was done accordingly. After verdict, a motion for a new trial was made by plaintiff, which the court overruled and rendered judgment for defendant. A bill of exceptions containing all the testimony was filed. This judgment, at special term, was affirmed at general term of the Superior Court of Cincinnati.

Follet & Dawson, and J. M. Spencer for plaintiff in error.

Matthews & Shoemaker for defendant in error

McILVAINE, J.—The record shows that in the year 1871, the Cincinnati & Springfield Ry. Co., having acquired a right of way, one hundred feet wide, through the lands of plaintiff and others, entered into a contract with Snell, Denton & Co., for the construction of its railroad through said premises, as follows:

"These articles of agreement, made and concluded this 19th day of May, in the year of our Lord one thousand eight hundred and seventy-one, by and between Nixon Denton, E. H. Williams, Abner Taylor, James Aken, Thomas Snell, James T. Snell, as Snell, Denton & Co., of the first part; and the Cincinnati & Springfield Ry. Co., of the second part.

"Witness: That for and in consideration of the payments and covenants hereinafter mentioned, to be made and performed by said railroad company, the said party of the first part doth hereby covenant and agree to construct and finish, in the most substantial and workmanlike manner, to the satisfaction and acceptance of the engineer of the Cincinnati & Springfield Ry. Co., all the grubbing and clearing, excavation, embankment, on sections number one (1) to twenty-four (24), both inclusive, of the Cincinnati & Springfield Ry., between Cincinnati & Dayton, the said work to be done as described in the following specifications, and agreeably to the directions, from time to time, of the said engineer or his assistants, and finished on or before the first day of February, in the year one thousand eight hundred and seventy-two.

"Grubbing and clearing.—When the surface of the ground on which embankments are to be built, is not more than one (1) foot below the grade line, and in all cases where excavations are to be made, the trees, stumps, and saplings on the entire ground over which excavations will extend, shall be grubbed. All stumps, trees, and saplings not required to be grubbed, and standing on the ground to be occupied by embankments, shall be chopped down close to the surface of the ground, and so as to be not less than one foot below grade. The entire ground on which embankments or excavations are to be made, and such additional width, not exceeding fifty feet on each side, as the engineer of the railroad may direct, shall be cleared of all trees, logs, brush and other perishable matter, and all fences shall be removed to or beyond the limits of the right of way of the company. The fences, buildings, timber and wood on the line of the railroad are the property of the railroad company or of the land-owners, and may be taken down and removed by the owner within a reasonable time, and all such as shall not be so removed shall be cleared off by the contractor and piled up and preserved for the use of the owner, on the direction of the engineer. The contract prices will be understood as covering and including all grubbing and clearing necessary or required at borrowing pits.

"Earthwork.—The grading will generally be for a single-track railroad, with excavations twenty-two feet wide at grade line, and embankments sixteen feet wide at grade line, but increased width shall be made for passing places or side-tracks, at such places as the engineer may direct. Grade line is eighteen inches below the height at which the tops of the cross-ties are to be placed for the railroad track on the grade when finished.

"Excavation will include all cuttings for the road-bed, for ditches and drains, for changing turnpike or common roads and channels of streams and all other cuttings necessary to or connected with the railroad, and which shall be directed by the engineer. Excavation will be measured in the prism of the road-bed while the material is in place. Material wasted after being excavated, and not placed in embankments, will be paid for as excavations only. Excavations will be of such width and depth, and with the side slopes of such inclination as the engineer may direct. Earth taken from roadway excavations, and hauled three hundred feet and less, and placed into roadway embankments, will be estimated as excavations only, and for all earth from roadway excavations, hauled three hundred feet and over, and placed into roadway embankments, the contracts will specify the price to be paid per cubic yard for each one hundred feet haul over three hundred feet, in addition to the price for roadway excavations; but no other measurement or allowance will be made for roadway embankments made from earth taken from roadway excavations. Earth from

roadway excavations to be hauled into embankments, as far as the engineer directs, not exceeding two thousand feet. In all cases where earth from roadway excavations is wasted or carried into spoil-bank, a space of three feet must be left between the top slope of the excavations and such spoil-banks, and the earth so wasted must be placed, and spoil-banks so formed as to slope backward from the road-bed excavation in such manner as the engineer shall direct, and so as to carry all surface water from the road-bed. Earth from roadway excavations wasted or carried into spoil-banks, will be estimated as excavations only, and no allowance will be made for haul. Rock excavations will be fourteen feet in width at grade, with such side slopes as the engineer shall direct. All rock taken from the cuts shall be piled up along side of cuts, as directed by the engineer, and be the property of the railway company.

"Excavations will be classified as solid rock, loose rock, and earth excavations.

"Solid rock excavation will include all sand rock or lime rock which may be found in place, or which, if not so found, shall be in masses or blocks, each containing over one cubic yard; and also, all the interlying stratified slate between the different strata of limestone in place.

"Loose rock excavation will include all detached rocks containing over one cubic foot each.

"Earth excavation will include all material which does not specifically belong to rock excavation.

"Embankments for road-bed of railroad, for common roads, road crossings, bridge approaches, guard banks, and embankments of whatsoever kind required to construct, or for whatsoever purpose incidental to or connected with the construction of the railroad, and which may be required by the engineer in charge, shall be built at his direction. Embankments shall, as far as practicable, be built of the material taken from the cuts. They shall be commenced at bottom of full width, and carried up with the required slope. The form and dimensions of embankments shall conform to the stakes and directions of the engineer, and embankments which will be required about masonry shall be built at such time, and in such manner, and of such material, as the engineer shall direct. Embankments shall be built of such height and width as will, in the opinion of the engineer, leave them of full size when they shall have become fully settled and compact. Embankments made from borrowed earth will be measured in the prism of the road-bed, and in no case, unless specially directed by the chief engineer, will borrow pits be measured. Borrowed earth to form embankments will be taken from such place as may be selected by the engineer, and the excavation made in borrow pits shall be so shaped and worked as not to unnecessarily injure or disfigure the

lands on which they are made. Should the engineer require borrowed earth to be hauled over three hundred feet into embankments, then the haul over three hundred feet to be paid for at the contract price for haul. All borrowing ditches, from which earth is taken to form embankments, must be so worked and shaped as to leave good, continuous and uniform ditches, to afford free passage to all water along and from said ditches. The inner side of all such ditches must have same slope as roadway embankments; a berme of two feet where embankments are five feet and less, and three feet where embankments are over five feet, must in all cases be left between the outer toe or base of embankment, and the inner angle of side or borrowing ditches. Embankments shall be built in layers of not more than three feet vertical height, extending across the bank for its full width. In case where temporary trestling is required, in order to grade the track as first laid over, or from masonry or streams or uneven ground, such trestling shall be built by the contractors without charge to the company. And in all cases the contract price for work will be understood to cover and include all materials, labor and expense required for the work, and everything required for or incidental to the carrying on or completion of the same.

"Whenever the route of the railroad is traversed by public or private roads, commodious passing-places must be kept open and in safe condition for use. And in passing through farms or lots, the contractor must also keep up, at his own expense, such fences as will be necessary for the preservation of the property and the trees, grass, and other crops.

"The work to be commenced as soon as the railway company acquire title to the lands upon which the work is to be done.

"No charge shall be made by the contractor for hindrance or delay, from any cause, in the progress of the work or any portion thereof.

"All of the work shall be done in a neat, substantial and workmanlike manner, and at the time of the acceptance of any part of it, the same shall be neatly trimmed, and in all respects fully completed, to the satisfaction of the engineer in charge.

"And the said Cincinnati & Springfield Ry. Co. doth promise and agree to pay to the said party of the first part, for completing this contract as follows, viz.:

"For grubbing and cleaning, ten (10) dollars per station of one hundred feet, for work actually done.

"For earth excavation, per cubic yard, nineteen (19) cents.

"For rock excavation, per cubic yard: Loose rock excavation, seventy (70) cents; solid rock excavation, one dollar and ten cents ($1.10).

"For haul, per cubic yard, per one hundred feet after first three hundred feet, one and one half (1½) cents.

"For embankment from borrowed earth, per cubic yard twenty (20) cents.

"And for all work for which no price shall be fixed in this contract, such price as shall be agreed on by the parties, or, if the parties shall not be able to agree, such price as the engineer shall deem reasonable and fair.

"On or soon after the first day of each month, during the progress of this work, an estimate shall be made of the relative value of the work done, to be judged of by the engineer; and ninety per centum of the amount of said estimate shall be paid to the party of the first part, by the twelfth of the month in which said estimate shall be made; and when all the work embraced in this contract is completed, agreeably to the specifications, and in accordance with the directions and to the satisfaction and acceptance of the engineer of said railroad company, there shall be a final estimate made by said engineer, of the quantity, quality, character, and value of said work, according to the terms of this agreement; and within ten days after date of such estimate, the balance appearing due to the party of the first part shall be paid to the said first party, upon the said party giving a release to the said railroad company from all claims and demands whatsoever, growing in any manner out of this agreement; and when any three (3) consecutive sections thereof shall be fully finished as above, the same shall be accepted by said company.

"It is further covenanted and agreed, between the said parties, that said party of the first part shall give personal attention and superintendence to the work embraced in this contract.

"The said party of the first part further agrees not to keep, or suffer to be kept or used, ardent spirits on the work, or in any house or tenement built or occupied by said party, or by the workmen in the employment or under the control of said party, on or near said road; and agrees to discharge from his employment, and from the work, any person who is guilty of a breach of this regulation.

"It is further agreed and understood, that the work embraced in this contract shall be commenced within twenty-five (25) days (or as soon as the right of way is obtained) from this date, and prosecuted with such force as the engineer may deem adequate to its completion within the time specified; and if at any time the said party of the first part shall refuse or neglect to prosecute the work, and every part of it, with a force sufficient in the opinion of the said engineer to secure its completion within the time specified in this agreement, then and in that case, the engineer, or such other agent as he may designate, may, on ten days' notice, proceed to take possession of, and use in completing the work or any part of it, such tools, machinery, tenements and other buildings and supplies or materials as may be in the work, or prepared for it, and

belonging to the party of the first part; to purchase such additional tools, material, machinery, buildings and supplies as he may deem necessary or proper; and to employ such number of workmen, laborers, teams and overseers as may in the opinion of said engineer be necessary to insure the completion of the work within the time hereinbefore limited, or as soon thereafter as may be practicable, at such prices and wages as he may find it necessary or expedient to give; pay for all such purchases and teams, and all persons so employed, and charge over the amount so paid over to the party of the first part, as for so much money paid to said party of the first part on this contract. And for failure to prosecute the work with an adequate force, for non-compliance with his directions in regard to the manner of performing it, or for any other omission or neglect of the requirements of this agreement and specifications, on the part of the party of the first part or in case the party of the first part shall do, or persist in doing, any portion of the work embraced in this contract, in an unfaithful and unworkmanlike manner, then, for any such omission or neglect, or failure, or for such unfaithful or unskilled performance, the engineer may, at his discretion, declare this contract, or any portion or section embaraced in it, forfeited—which declaration of forfeiture shall exonerate the said railroad company from all obligations and liabilities arising under this contract, so far as they relate to the portion or section declared forfeited, the same as if this agreement had never been made; and the reserved percentage upon work done by the party of the first part, on the forfeited portion or section, may be retained forever by the said railroad company. The masonry on the sections embraced in this contract shall be done, or other provisions therefor made, in time by the railroad company not to delay the work.

"And it is mutually agreed, and distinctly understood, that the decision of the chief engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement, relative to or touching the same, and each and every of said parties does hereby waive any right of action, suit or suits, or other remedy in law or otherwise, by virtue of said covenants; so that the decision of the said engineer shall, in the nature of an award, be final and conclusive on the rights and claims of said parties.

"In witness whereof, the said Cincinnati & Springfield Ry. Co. has, by its president, executed and signed the same, and caused the seal of the company to be affixed; and the said Snell, Denton & Co. have hereunto set their hands and seals the day and year first above written in duplicate.

"Signed, SNELL, DENTON & Co.

"THE C. & S. RAILWAY CO.

"Witness: By R. M. SHOEMAKER, President."

Snell, Denton & Co. entered on the performance of this contract, and, in making an excavation within the right of way, through plaintiff's lands, removed and deposited the waste dirt on the lands of the plaintiff not embraced in the right of way to her damage, as complained of in her petition.

The main question before us is, was the railway company responsible for the wrongful act of Snell, Denton & Co.?

The plaintiff's claim is stated by counsel thus:

"We claim for plaintiff:

"First, that the defendant retained control over the mode and manner of doing the work, and that the contractors were, therefore, not independent contractors.

"Second, that if the injury had been committed by independent contractors the defendant would, nevertheless, be liable, because

"1. It cannot delegate to others the responsibility for the proper performance of that work which it alone was authorized by law to do. It took the privileges conferred upon it cum onere.

"2. The owner or possessor of fixed property is responsible that it be so used, even by his independent contractors, as that others shall receive no injury.

"3. Where injury results directly from the acts which the contractor is authorized, or permitted to do, the person who employs the contractor and authorizes or permits him to do those acts, is liable to the injured party."

The first claim, in substance, is that Snell, Denton & Co. were the servants of the railway company, and therefore the doctrine of respondeat superior applies. Whether the liability contended for be strictly within the rule of respondeat superior, or an exception to the rule of non-liability of an employer for the misconduct of a contractor, the law is certainly well stated in Cincinnati *v.* Stone, 5 Ohio St. 38, that,

"Where the employer retains the control and direction over the mode and manner of doing the work, and an injury results from the negligence or misconduct of the contractor, or his servant or agent, the employer is placed under a liability equal and similar to that which exists in the ordinary case of principal and agent."

The fact assumed, however, in this claim, depends wholly on the contract above set forth, and after a careful consideration of all its terms, we are unanimously of opinion, that the railway company had no control or direction over that part of the work which resulted in damage to the plaintiff. True, the contract subjects Snell, Denton & Co., in a score or more of particulars, to the direction of the company's engineer. But, with one exception, the right to direct thus reserved to the engineer, relates only to the quantity of work to be done in the construction of the road, or to the condition of the work when completed, and not to the mode or manner of doing the work. The retaining of such power of control or

direction does not bring the case within the reason or spirit of the rule in Cincinnati v. Stone. The principle of that rule undoubtedly is, that the right of control retained by the employer must be such as devolves upon him the duty to protect third persons from injury, and hence he cannot be heard to say that he did not direct or assent to the mode and manner in which it was done, if injury results.

Much stress is laid upon the following clause, found in the specifications concerning excavations: "earth from roadway excavations to be hauled into embankments as far as the engineer directs, not exceeding two thousand feet. In all cases where earth from roadway excavations is wasted, or carried into spoil-banks, a space of three feet must be left between the top slope of the excavation and such spoil-banks, and the earth so wasted must be so placed and spoil-banks so formed as to slope backward from the road-bed excavation in such manner as the engineer shall direct, so as to carry all surface water from the road-bed."

The power of the engineer to direct, under this clause, is limited to cases where waste earth from an excavation is thrown out over the top slope of the excavation into spoil-banks, and as to the manner in which such spoil-banks shall be made to slope backward from the excavation.

Conceding that the railway company would be liable for an injury from the mode and manner in which such spoil-banks might be constructed, under the direction, or without the direction of the engineer, it is not claimed that the plaintiff was so injured. In wasting the earth which resulted in plaintiff's injury, the contractors were acting on their own responsibility without any control, or right of control, on the part of the engineer, as to the mode or manner of doing the work.

Again, by the terms of the contract, Snell, Denton & Co. agreed "to do the work as described in the specification, and agreeably to the direction, from time to time, of the engineer or his assistants." By these terms, it is contended, that the railway company reserved a general control over the mode and manner of doing the work. When the whole contract is considered, it is quite clear that "the directions of the engineer or his assistants," here referred to, are those only which are specially named in the specifications.

We find no provision in the contract whereby the railway company reserved any control or right to direct the mode and manner of wasting the earth which was cast upon plaintiff's lands by Snell, Denton & Co. Neither do we find that the company assumed, in any manner, to control the contractors in respect to such work. Hence the liability of defendant on this ground, is not found in the proper construction of this contract.

The second claim of plaintiff is, that if the injury had been com-

mitted by independent contractors, the defendant would nevertheless be liable.

The general rule, that employers are not liable for the negligence or misconduct of independent contractors, is not disputed. It is contended, however, that the rule does not apply in cases of contracts with respect to real property. This contention cannot be maintained. The rule applies to contracts in respect to real as well as personal property. It is, however, in respect to real estate, subject to these exceptions: the employer cannot relieve himself from liability by contracting with others for the performance of work where the necessary or probable effect of the performance of the work would injure third persons; nor can he relieve himself of duties resting upon him as the owner of real estate not to do, or suffer to be done upon it by others, that which would constitute a nuisance. Cooley on Torts, 547. The railroad constructed on defendants' right of way is not complained of as a nuisance; nor does it appear that the wasting of earth on plaintiff's land was a necessary or probable consequence of the construction of the road. Personally, I think, under this contract, the defendant was bound to furnish space for the deposit of waste material, and, if it did not, it might be inferred that it assented to or procured the contractors to cast it upon plaintiff's land; but for aught that appears in this record, ample space was provided, and the act of casting the waste earth on plaintiff's land was a wilful trespass by the contractors, of which the railway company had no knowledge, even by its engineer, and to which it in no wise consented.

Again, it is contended that a railroad company cannot delegate to others the responsibility for the proper performance of work which it alone was authorized to do.

The scope of this proposition is not readily perceived. In support of it, it is said in argument, that "when the Legislature gives a railway corporation the right to take the land of citizens and build its railway thereon without their consent, it confers a dangerous and extensive authority, and it cannot be implied that the recipient of such power may re-delegate it, or shift the responsibility for its proper exercise. The acts of the contractor's workmen were the acts of the defendant. Except for defendant's charter those workmen would have been trespassers on plaintiff's land. They were there doing work which the defendant alone was authorized to do. They were there in defendant's right and exercising defendant's corporate functions." This argument is fallacious. These workmen on plaintiff's land were trespassers, notwithstanding defendant's charter. The defendant was not authorized to do work there. This work was not the exercise of corporate functions.

Undoubtedly the defendant could not transfer to its contractors the right to be a corporation, or the right of eminent domain, or

the right to commit a trespass. If the defendant had sent its contractors upon land where it had no right to go, for the purpose of building its road or wasting material, its liability could not be doubted. The question in this case, however, is this: If a railway company, by the exercise of its power of eminent domain, acquires all the land necessary to the construction of its road, and sends its contractors to construct its road thereon, is it necessarily liable for a trespass committed by them while engaged upon the work? We think not. The work of constructing a railroad is not corporate work unless it be done by a corporation through its agents and servants. And a person may contract with a railroad company to construct its road without becoming its agent or servant.

This proposition, therefore, resolves itself into a single question, may a railroad corporation, having power to contract as fully as a natural person in relation to its corporate business, enter into a contract with another person for the construction of its road without retaining control over the mode and manner of doing the work? We can see no reason to doubt it. Of course any condition imposed upon the right to construct its road must be performed, and the company cannot shift its responsibility for the performance. But this is no new principle, nor one applicable to railroad corporations alone. When a right is possessed by a natural person, and a duty is attached to the exercise of the right, such duty must be performed; such natural person cannot relieve himself from liability through the intervention of an independent contractor.

So, on the other hand, when the law exempts a natural person, as employer, from liability for the wrongful act of his contractor, it must also, under like circumstances, exempt a corporation, as employer, from liability for the wrongful act of its contractor.

Judgment affirmed.

Liability of Railroad Company for Acts and Defaults of Contractors.—The above case involves the interesting and important question of the responsibility of a railroad company for the acts or negligence of contractors engaged in the construction of its road. We do not propose to review in this note the broad subject of what does and does not constitute an independent employment. We shall consider the subject in hand only so far as it relates to the law of railroads.

General Principles—Independent Employment.—Where the employment of the contractor is an independent employment and he is not guided and directed by the company as to the manner of performing the work in hand, the result being looked to as the primary and the means as the entirely secondary consideration, the company will not be held liable for injuries occasioned by his neglect. McCafferty v. Spuyten Duyvil & P. M. R. Co., 61 N. Y. 178.; Kansas Central R. R. Co. v. Fitzsimmons, 18 Kans. 34; Cuff v. Newark & N. Y. R. R. Co., 6 Vroom, 17; Powlet v. Rutland & W. R. Co., 28 Vt. 297; West v. St. Louis, V. & T. H. R. R. Co., 63 Ill. 545.

Trains and Engines.—A railroad company is not liable for personal injuries caused by trains and engines run by contractors in charge of the construction of the road. Central R. & B. Co. v. Grant, 46 Ga. 417; Union Pacific R. Co. v. Hause, 1 Wyoming, 27; Meyer v Midland Pacific Ry. Co., 2

Neb. 319; Kansas Central R. Co. *v.* Fitzsimmons, 18 Kans. 34; Cunningham *v.* International R. R. Co., 51 Tex. 503. The same principle obtains where injuries are occasioned by cars drawn by horses where both drivers and horses are under control of the contractor. Schular *v.* Hudson River R. R. Co., 38 Barb. 653.

Blasting Stones.—The company is not responsible for personal injuries occasioned in rock blasting. McCafferty *v.* Spuyten Duyvil & P. M. R. Co., 61 N. Y. 178; Tibbetts *v.* Knox & L. R. Co., 62 Me. 437. But see Stone *v.* Cheshire R. R. Corp., 19 N. H. 427; Carman *v.* Steubenville & I. R. Co., 4 Ohio St. 339. Not even when nitro-glycerine is the explosive used, provided of course that its use is not stipulated in the contract. Cuff *v.* Newark & N. Y. R. Co., 6 Vroom (N. J.), 17. A railroad company is not liable for personal injuries occasioned by the falling of stones upon passengers on the highway, occasioned by the negligence of the contractor. Reedie *v.* London & N. W. R. Co., 4 Exch. 244; Hobbit *v.* London & N. W. R. Co., 4 Exch. 254. Nor is the company liable for an injury occasioned by stones negligently left by a contractor on a public highway. Pawlet *v.* Rutland & W. R. Co, 28 Vt. 297.

Poison—Servants of Contractor.—The company is not liable for an injury occasioned to the servant of the contractor in consequence of the use by the latter of a poisonous mixture applied to the timber upon which the servant is working to prevent decay. West *v.* St. Louis, V. & T. H. R. R. Co., 63 Ill. 545.

Real Estate.—Where the work itself which the contractor is employed to do is not a nuisance the company will not be liable for the contractor's negligent or unlawful acts on or about real estate. McCafferty *v.* Spuyten Duyvil & P. M. R. Co., 61 N. Y. 178; King *v.* N. Y. Central & H. R. R. Co., 66 N. Y. 181; Cuff *v.* Newark & N. Y. R. R. Co., 6 Vroom (N. J.), 17; Reedie *v.* London & N. W. R. Co., 4 Exch. 244.

It is not, therefore, liable for an unlawful entry by him upon land. Eaton *v.* European & N. A. R. Co., 59 Me. 529; Clark *v.* Vermont & Can. R. R. Co., 28 Vt. 103.

Nor for the act of the contractor in negligently pulling down fences so as to let cattle go astray. Clark *v.* Hannibal & St. Joe R. R. Co., 36 Mo. 202; Clark *v.* Vermont & Canada R. R. Co., 28 Vt. 103.

Nor for his act in cutting a drain in the course of making an embankment so as to do injury to crops. Steel *v.* S. E. Ry. Co., 16 C. B. 550.

Nor for the kindling of fires by him which are negligently allowed to spread to adjoining land. Callahan *v.* Burlington & M. R. R. Co., 23 Iowa, 562; Eaton *v.* European & N. A. R. Co., 59 Me. 520.

Provisions in Contract not Inconsistent with Position of Independent Contractor.—There are many provisions in the contract for construction of the road which have been held not to be inconsistent with the position of an independent contractor.

The fact that the company retains the power to discharge incompetent workmen does not render it responsible for the contractor's negligence. Reedie *v.* L. & N. W. R. R. Co., 4 Exch. 244; Hobbit *v.* London & N. W. R. Co., 4 Exch. 254; Cuff *v.* Newark & N. Y. R. Co., 6 Vroom, 17.

Neither does the fact that the contractor is working in accordance with specifications take away the independent character of his employment. Hunt *v.* Pennsylvania R. R. Co., 51 Pa. St. 475.

The retention of a right to supervise the work generally does not render the company liable for the contractor's negligence. Eaton *v.* European & N. A. R. Co., 59 Me. 520. Nor does the giving of directions as to the results to be attained by the work without specifying the particular methods to be used. Schular *v.* Hudson River R. R. Co., 38 Barb. 653; Callahan *v.* Burlington & M. R. Co., 23 Iowa, 562.

A provision in the contract that the contractor shall be liable to the company for all negligent acts, and that the company may retain from his compensation a sum sufficient to make amends for all injury done, does not enure to the benefit of outside persons injured by the negligence of the contractor so as to render the company liable to them. Tibbetts v. Knox & L. R. Co., 62 Me. 437.

Direct Superintendence of Company.—Where the railroad company has direct superintendence and direction of the work in hand, both as regards the methods employed and the result attained, the employment of the contractor ceases to be an independent employment. He sinks to the position of a servant and the company is therefore on familiar principles held liable for his negligence. Carman v. Steubenvillle & I. R. Co., 4 Ohio St. 399; New Orleans, M. & C. R. Co. v. Hanning. 15 Wall. 649; Phila., W. & B. R. Co. v. Phila. & H. Steam Towboat Co., 23 How. 209.

Dangerous Employment.—Where the work upon which the contractor is employed is in its nature dangerous, so that the company could reasonably foresee that damages would ensue, it cannot shelter itself from liability by throwing the blame on the contractor.

Where, therefore, an adjacent building was damaged in consequence of the blasting of hard rock by a contractor whose contract called specially for such blasting, the company was held responsible for the damages. Carman v. Steubenville & I. R. Co., 4 Ohio St. 399; Stone v. Cheshire R. R. Corporation, 19 N. H. 427. But such a result will not follow where the blasting is not called for by the contract or where in the nature of things it could not reasonably be foreseen that the injury in question would result from the blasting, the same being caused by the negligence of the contractor or his servants. Tibbetts v. Knox & L. R. Co., 62 Me. 437; McCafferty v. Spuyten Duyvil & P. M. R. Co., 61 N. Y. 178.

Contractor Exercising Right of Eminent Domain. — There are many authorities that hold that where a contractor in the course of constructing the railroad is using the right of eminent domain vested in the company and abuses that right by making an improper entry on land or doing unnecessary damage thereto, the company is not absolved from liability. It is said to be contrary to public policy in such case to allow the company by delegating its rights to escape responsibility for the misuser of them. Lesher v. Wabash Nav. Co., 14 Ill. 85; Hinde v. Wabash Nav. Co., 15 Ill. 72; Chicago, St. P. & F. R. Co. v. McCarthy, 20 Ill. 385; Chicago & R. I. R. Co. v. Whipple, 22 Ill. 105; West v. St. Louis, V. & T. H. R. Co., 63 Ill. 545; Cairo & St. L. R. Co. v. Woolsey, 85 Ill. 370; Veazie v. Penobscot R. Co., 49 Me. 119; Vermont Central R. R. Co. v. Baxter, 22 Vt. 365; Macon & A. R. Co. v. Mayes, 49 Ga. 355; Houston & G. N. R. Co. v. Meador, 50 Tex. 77; Cunningham v. International R. Co., 51 Tex. 503.

Where, therefore, the company had acquired a right to construct a bridge across a navigable stream, so nevertheless that navigation was not interfered with, it was held responsible for the detention of a vessel in the stream caused by the negligence of a contractor who had been employed to build the bridge in question. Hole v. Sittingbourne & Sheerness R. Co., 6 H. & N. 488.

Statutory Duty.—Where a statutory duty is cast upon a company, it cannot escape from liability on the ground that the road has been in the possession of a contractor at the time who has neglected the duty in question. The company cannot, therefore, escape from liability for a failure to perform the statutory duty to fence on the ground that a contractor had possession of the road at the time in question. Nelson v. Vermont & Canada R. R. Co., 26 Vt. 717; Houston & G. N. R. Co. v. Meador, 50 Tex. 77; Bay City & E. S. R. Co. v. Austin, 21 Mich. 390.

Nor can it on the same ground escape responsibility for a failure to dis-

charge the statutory duty of providing barriers for the protection of travellers at street crossings. Lowell *v.* Boston & Lowell R. R. Corp., 23 Pick. 24.

St. Johnsbury and Lake Champlain R. R. Co.
v.
Hunt.

(55 *Vermont Reports*, 570.)

An action may be sustained by a master against one maliciously causing the arrest of his servant, when no legal cause of action existed against the servant, and the arrest was for the sole purpose of injuring the master; and, maliciously causing the arrest of a railroad company's engineer while running a train of cars, to delay the train and thereby damage the company, is actionable. And, *held* on demurrer, that it was not necessary to aver what became of the defendant's suit against the servant, if the pleadings admit that it was malicious, false, and hopeless.

Action by railroad company against one for maliciously causing the arrest of its engineer. Heard on demurrer to the declaration, June Term, 1882, Caledonia County, Ross, J., presiding. Demurrer pro forma sustained. The declaration averred, in part:

"That the said defendant on said 2d day of November, A.D. 1881, was the owner of a certain one year old heifer and certain other cattle; that on said 2d day of November, A.D. 1881, the said defendant, at Johnson aforesaid, wrongfully, carelessly and negligently permitted said heifer and other cattle to be and remain on a public highway, in said town of Johnson, which crosses the plaintiff's railroad, and wrongfully permitted said heifer and other cattle to wander from said highway on to said plaintiff's railroad in said Johnson, and wrongfully to remain thereon; and the plaintiff says that while said heifer was thus wrongfully upon said railroad the said heifer was struck by the plaintiff's said engine and train thus skilfully, carefully and prudently run as aforesaid, and was slightly injured thereby, to wit, at Johnson, on said 2d day of November; and the plaintiff says that one ——— Collins was the plaintiff's engineer running the said plaintiff's engine and train as aforesaid; that the said Collins managed said engine and train with skill, care and prudence at the time said engine struck said heifer; that said defendant's said heifer was not struck or injured by any wrongful act or neglect of the said Collins as such engineer; that the said defendant had no just or legal cause of action against the said Collins by reason of said heifer's being struck by said engine as aforesaid; that said injury arose from the willful act and neglect of said defendant permitting said heifer to be

wrongfully on said railroad; and the defendant well knew that he had no just or legal cause of action against the said Collins; yet the said defendant, not regarding the rights of the plaintiff, for the sole purpose of injuring the plaintiff in this behalf and of delaying and hindering the plaintiff in the operation of its said road aforesaid in the running of its trains, at Johnson aforesaid, on the 7th day of November, A.D. 1881, sued out a writ of attachment against the goods, chattels and estate of the said Collins and capias against the body of the said Collins, . . . and dated the 7th day of November, A.D. 1881, and directed to any sheriff or constable in the State to serve and return, commanding such officer to attach the goods, chattels or estate of the said Collins, and for want thereof to take his body, etc.; . . . and the plaintiff says that the said defendant, well knowing that the said Collins was an engineer of the plaintiff and then engaged in running one of the plaintiff's engines and trains upon said railroad, and that the arrest and detention of the said Collins would delay the plaintiff's said engineer and train and greatly damage the plaintiff, on the 7th day of November, A.D. 1881, at Johnson aforesaid, placed said writ in the hands of a deputy sheriff of said County of Lamoille, and wrongfully, with the sole purpose of harrassing the plaintiff and delaying it in the operation of its said road and in the running of its trains, caused said deputy sheriff by virtue of said writ to stop the plaintiff's train, on which said Collins was then and there engineer, at an undue and improper hour, to wit, at the hour of three o'clock in the morning, and to arrest the body of said Collins while so running said engine and train of the said plaintiff, and to imprison the body of the said Collins for a long space of time, to wit, for the space of one hour, and thereby to deprive the plaintiff of its said engineer, and to delay and impede its said train for the same space of time."

Belden & Ide, for the plaintiff.

This is not a case of the doing of a lawful act from a malicious motive, because the act was unlawful; unlawful in this,—arresting Collins from an honest motive would be lawful; but arresting him from malicious motives, knowing that no cause of action existed, was unlawful. A prosecution, an arrest, an excessive attachment, etc., malicious and without probable cause, are all unlawful. 1 Willard Torts, 414, 423, 435. Both the master and servant had a cause of action against the defendant. The damages are not too remote. 1 Sedgw. Dam. 66, 88; 13 Tex. 324; Derry *v.* Fletner, 118 Mass. 131. Delay of the plaintiff's train was the direct, proximate, immediate, and necessary result of the defendant's act,—the arrest of the engineer. The whole proceeding was aimed at the plaintiff; and it struck just where it was aimed. McAfee *v.* Crofford, 13 How. 447; Gunler *v.* Astor, 16 E. C. L. 357; 19 Johns. 381; Vannerburgh *v.* Truax, 4 Denio, 464; Burrows *v.* Coke, L.

R., 5 Ex. 67; Scott *v.* Kenton, 81 Ill. 96; Tarleton *v.* McGawley, Peake, 205; Ashley *v.* Harrison, ib. 194; McCarthy *v.* Guild, 12 Met. 291: Haywood *v.* Collinge, 9 Ad. & E. 268; Page *v.* Cushing, 38 Me. 527. If I should descend into a deep well to repair or cleanse it, leaving only my servant at the top to draw me up, can the defendant take advantage of my situation, arrest and carry off my servant on a known false and malicious writ for the sole purpose of depriving me of his service, and leave me to die at the bottom of the well, with no liability to me for the wrong thus purposed and consummated? He can, if the theory of the defence in this case is correct. See Griffin *v.* Farwell, 20 Vt. 151.

P. K. Gleed, for the defendant.

It is true, perhaps, that the novelty of this case is not conclusive against it. The question is: Has the plaintiff been injured in a legal right? Was the act of arresting Collins illegal as to this plaintiff? It may or may not be legal as to Collins. That is not the question. What is the fair scope of the words, "caused the said deputy sheriff by virtue of said writ to stop the plaintiff's train"? This cannot mean a physical interference with the train, —throwing the writ across the track, and commanding it to stop, or by other force. The words mean that the sheriff caused the train men to stop the train so that he could arrest Collins. The gravamen of the count is the arrest of Collins; and the question remains, was it an infringement of the plaintiff's rights? The pleader gains nothing by stating the motive, if the act was legal. So, Royalton Bank *v.* Suffolk Bank, 27 Vt. 505; Chatfield *v.* Wilson, 28 Vt. 49; 11 Vt. 22. There is no averment of malice, or want of probable cause, against Collins. The damage as to the plaintiff was damnum absque injuria. The railroad company cannot raise the question of the illegal arrest of Collins. He alone can sue for malicious prosecution,—and that only after judgment in his favor on the writ on which he was arrested. 44 Vt. 124; 42 Vt. 276; 1 Am. Lead. Cas. 751. Inconvenience resulting from legal action is damage without injury. Reeves Dom. Rel. 536. At common law the killing of a person upon whom another person depended for support was not actionable; much less the legal arrest of a railroad's engineer. 1 Smith Lead. Cas. 445. No right of the plaintiff has been infringed upon. The damage is too remote. 1 Smith Lead. Cas. 450; Barker *v.* Willard, 18 C. B. 58; 11 Ired, 291; 2 Addison Torts, 6. That a judgment against Collins in the first suit would be a bar; see 25 Vt. 635; 39 Vt. 326; Bigelow Estop. 61; it should, therefore, have been alleged that that suit terminated, and in his favor.

Veazey, J.—The case stands on demurrer to the first count of the declaration. The defendant's counsel contends that the "gravamen of the count is the arrest of Collins," and that his arrest was

no infringement of the rights of the plaintiff; that this was illegal, if at all, only as against him, and that the plaintiff cannot recover damages for an act not illegal as to itself; that the damages resulting to the plaintiff from this arrest of its servant upon due process are damnum absque injuria.

We think the assumption that the gist of the count is the arrest of Collins is unsound. The gist is the delay of the train for the purpose of injury to the plaintiff. To accomplish the injury the defendant resorted to the contrivance of a legal proceeding against the servant. The process was correct in form, and was a legal warrant for the act of the officer. But, back of that, the act of resorting to legal proceedings against Collins was, under the averment, wrongful, and this wrongful act was adopted as a means and for the purpose of injuring the plaintiff. The preliminary or concurrent wrong to Collins did not alter the character of the wrong to this plaintiff. The wrong to Collins was the instrumentality adopted to accomplish this injury. A suit for malicious prosecution by Collins would not be affected by the fact that the officer was warranted in serving the original process, or that his act of arresting was legal as to him, but it would reach back to the question of motive and probability of cause. No more should the intervening act of the officer affect the plaintiff's remedy here. The same injury to the plaintiff might have been accomplished by placing an obstruction upon the track. Probably if the defendant had had a lawful claim against Collins, and the enforcement of it by legal process had produced the same injury to the plaintiff company, it would have been remediless even if the real motive of the process had been such injury; because it is immaterial with what motive a person does a legal act. But this suit is not brought by the plaintiff for interference with its servant and to recover damages resulting from loss of his services; it is brought for stopping and delaying the train to the plaintiff's injury. The declaration sets up the unwarrantable interference with the servant simply as a method by which the designed result was accomplished.

It is further contended in behalf of the defendant that Collins being the injured party has his action for the injury done, and that the defendant ought not to be subjected to two actions for the same act.

It is admitted under the demurrer that this plaintiff was injured by the act of the defendant which we hold was wrongful. It is no answer to a claim for this injury to say that this act also injured another party. Each party suffering directly from a wrongful act is entitled to a remedy against the wrong doer. A single act of trespass destroying one man's arm and another man's leg would create a right of action in each separately. Further suggestion is made that the declaration contains no averment that the suit against Collins has terminated in his favor, and that the same rule

should apply here as though this were his suit for malicious prosecution. This suggestion is made upon the assumption that the declaration shows a privity between Collins and the railroad company in respect to the subject-matter of the suit against Collins. Treating the assumption as correctly made, how does the case stand? The declaration states in substance that the suit against Collins was utterly groundless and hopeless. The demurrer admits this. The rule that the plaintiff in an action purely for malicious prosecution should allege and prove that the original proceeding has terminated in his favor, rests on the ground that the court will not tolerate inconsistent judgments upon the same question between substantially the same parties. But there is a class of actions for malicious prosecution where it has been held that an admission that the alleged malicious suit could not be maintained, obviated the necessity of proving it had terminated. Wills *v.* Noyes, 12 Pick. 326; Page *v.* Cushing, 38 Me. 527. In the latter case it was held that the admission may be by plea or by parol. The court there say: "The bare possibility of inconsistent verdicts should not exempt or relieve a party from responsibility for admitted wrong." This declaration does not state what became of the other suit. The demurrer admits it was malicious, false, and hopeless. Any presumption of probable cause, or that Hunt was in the pursuit of a legal right against Collins, is overcome by the admission. The technical averment which this declaration lacks is supplied by averments admitted to be true, showing that the result must follow or must have occurred which the omitted averment would have alleged had occurred. But if this answer to the above suggestion is unsound, upon what ground would this plaintiff be estopped by a judgment against the defendant in the former suit, so far as anything is disclosed in this declaration? It was not a party thereto, nor was it vouched in to defend. It neither assumed, nor had the opportunity, to control the defence. It was not in a situation to prevent a judgment against the defendant therein by collusion, by default, by ignorance, or by concession or compromise. Judgments are conclusive only upon parties and those claiming under them. This rule, upon the ground that a principal and servant are substantially one in interest, might well be expanded so as to admit it in a suit against a servant when the same question has been decided and judgment rendered for the defendant in a suit against the master for the alleged trespass of the servant for which the master is responsible, as illustrated in the case of Emery *v.* Fowler, 39 Me. 326; but such is not this case. The general rule is that the master is responsible for the acts of the servant; but there are several exceptions. Dunlap's Paley on Agency, 298. There may also be wrongs committed by the servant for which the master only is responsible. 2 Hil. on Torts, 554. The relative status of this plaintiff and its

engineer as to the wrong charged upon the latter cannot be certainly determined from this declaration; but treating it as a trespass for which this plaintiff was responsible, then they could have been sued together or separately; and they could have defended each independently of the other. Judgment unsatisfied against either separately would be no bar to another suit against the other. This point was settled early in this State in the case of Sanderson *v.* Caldwell, 2 Aik. 195; where the authorities are cited and fully discussed by Judge Prentiss. In the later case of Andrus *v.* Howard, 36 Vt. 248, the further question, somewhat controverted elsewhere, was here settled that the master is liable in trespass for an act of his servant, which is a trespass, though it occur through the neglect or unskilfulness of the servant. As joint trespassers, independent of the relation of master and servant, it is plain the former judgment for the plaintiff, if there was one, would not conclude this plaintiff. With this relation existing if the judgment was there for the defendant, it is equally plain that it would not have concluded the plaintiff therein from another action against this plaintiff if the former action failed on the ground that the wrong which the former plaintiff suffered, though committed by the servant, was one for which this plaintiff only, if anybody, was liable. "No person can bind another by any adjudication, who was not himself exposed to the peril of being bound in like manner, had the judgment resulted the other way." Freeman on Judgments, s. 154; or as expressed by Spencer, J., in Case *v.* Reeve, 14 John. 83: "No person can derive benefit from a verdict who would not have been prejudiced by it, had it gone contrary." If, therefore, a state of facts might be disclosed which would preclude the application of the maxim, res inter alios acta, etc., which is doubtful, this declaration fails to disclose them. The reason of the maxim as expressed by Wharton, 184, is, that it would be unjust to bind a person by proceedings taken behind his back, to which he was, in fact, no party, and to which he had not an opportunity of making a defence, and from which he could not appeal. Nason *v.* Blaisdell, 12 Vt. 171. We think no privity is disclosed in this declaration between the railroad company and its engineer, in respect to the point involved in the other action. It is further insisted that the action cannot be maintained because the damages are inconsequential and too remote. We think the injury and damages were direct. They were not only such as could reasonably have been contemplated at the time, which is one of the tests laid down in Sedgwick on Damages, vol. 1, marg. p. 66–7, but they were the damages actually contemplated. In Derry *v.* Flitner, 118 Mass. 131, the court say: "A wrong doer is liable not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries as, according to the common experience of men, are likely to result

from his act." Sedgwick, 88, says the disposition of courts is to include in the injurious consequence, flowing from the illegal act, those that are "very remote." No extreme view is required here. It cannot be said that the stoppage and delay of the plaintiff's train was a remote result of the defendant's act. It was the probable, if not necessary, result. And it was in fact the direct, proximate, immediate and contemplated result. Familiar cases often cited as showing what damages are not too remote to be included in the recovery, are McAfee *v.* Crofford, 13 How. (U. S.) 447; Gunter *v.* Astor, 4 J. B. Moore, 12 (16 Eng. Com. Law, 357); Gribb *v.* Swan, 19 J. R. 381; Vanderburg *v.* Truax, 4 Denio, 464; Burrows *v.* Coke & Gas Co., L. R. 5 Ex. 67; Scott *v.* Kenton, 81 Ill. 96; Tarleton *v.* McGawley, Peake, 205. In the latter case it was held by Lord Kenyon, at Nisi Prius, that an action lay for firing on negroes on the coast of Africa, and thereby deterring them from trading with the plaintiff, so that the plaintiff lost their trade. There the trespass was directly against the negroes, but the wrong intended and the injury actually done was to the plaintiff.

The defendant cites the case of Ashley *v.* Harrison, Peake, 194, where the proprietors of a theatre brought an action against the defendant for having written a libel upon one of the plaintiff's singers, by which she was deterred from appearing, whereby his profits were lost. Lord Kenyon held that the damages were too remote; but this was on the ground that the damages arose from the vain fears or caprice of the actress. She could have sung but would not. Her fears or caprice intervened between the wrongful act and the alleged result. To make the case parallel to this she should have been driven from the stage while performing her part by unlawful interference of the defendant, for the purpose of injury to the plaintiff. See Hughes *v.* McDonough, 14 Vroom's (N. J. Law) Reports; also published in Albany Law Journal, May 27, 1882, p. 410.

The pro forma decision of the County Court is overruled, and the first count is adjudged sufficient, and the cause is remanded with leave to the defendant to replead, upon the usual terms.

Liability to Master for Injury to Servant.—Where a company employs a servant, it has such an interest in his labor that if through the wrongful act of another the company is deprived of his services, it may bring an action and recover damages therefor. Ames *v.* Union R. R. Co., 117 Mass. 541; Dunden *v.* Barnett, 7 Ala. 169; Rice *v.* Nickerson, 9 Allen, 478; McCarty *v.* Guild, 12 Metc. 292; Dennis *v.* Clark, 2 Cush. 347; Woodard *v.* Washburn, 3 Denio, 369; Hyatt *v.* Adams, 16 Mich. 493; Skinner *v.* Housatonic R. R. Co., 1 Cush. 475; Green *v.* Hudson River R. R. Co., 2 Keyes (N. Y.) 294; Eden *v.* Lexington R. R. Co., 14 B. Monr. (Ky.) 204; Fort *v.* Union Pacific R. R. Co., 17 Wall. 553.

NASHUA AND LOWELL R. R. CO.

v.

PAIGE.

(135 *Massachusetts Reports*, 145.)

A. was employed as superintendent of a railroad corporation. at a fixed salary, the employment to be terminated by three months' notice in writing. The corporation leased its railroad for a long term of years to another corporation, of which lease A. had notice; and, upon his representation that he had accepted his position supposing it to be permanent, and that the lease would be a damage to him, for which he ought to be compensated, the corporation which employed him voted to pay him a certain sum as extra compensation whenever the lessee should take possession of the road. The lessee took possession on a certain day, and the corporation paid to A. the sum so voted, and also his regular salary up to that day. *Held*, in an action by A. against the corporation for three months' salary from the date when the lessee took possession, that it was error in the presiding judge, who tried the case without a jury, to rule that, as matter of law, A. was entitled to recover, without passing upon the question of fact whether A., by accepting the extra compensation voted, had not waived his right to the three months' notice provided for in the contract of employment.

CONTRACT for $875, money had and received. The defendant admitted that this amount was due, and filed a declaration in set-off, in which he alleged that this sum was due him for his services as superintendent of the plaintiff corporation from December, 1880, to March, 1881. Trial in the Superior Court, without a jury, before Rockwell, J., who found and ordered judgment for the plaintiff for $125; and the plaintiff alleged exceptions. The facts appear in the opinion.

A. S. Hall for the plaintiff.

C. S. Lilley for the defendant.

MORTON, C. J.—The only controversy in this case was upon the defendant's declaration in set-off, in which he claimed compensation for his services as superintendent of the plaintiff corporation from December 1, 1880, to March 1, 1881.

The defendant was employed by the plaintiff as superintendent of its railroad in August, 1878. On November 10, 1880, the plaintiff leased its railroad for a long term of years to the Boston & Lowell R. R. Corporation, which took possession and control of the railroad on December 1, 1880. The defendant had notice of this lease, and, very soon after it was executed, represented to the plaintiff that he had accepted the position of superintendent supposing that it

would be permanent; that the lease to the Boston & Lowell R. R. Corporation would be a damage to him; "and that the plaintiff corporation ought to compensate him for being left in a bad place." Thereupon the plaintiff's directors, on November 16, 1880, "voted that there be paid to Mr. Paige, superintendent of this road, the sum of $2000 extra for services while superintendent of this road, whenever the Boston & Lowell R. R. Corporation shall take possession of this road as lessee." On December 1, 1880, this amount, and also his regular salary up to that date, were paid to the defendant. At the trial in the Superior Court, without a jury, the court found the facts to be as we have stated them; but ruled that, as matter of law, the defendant was entitled to recover his salary as superintendent from December 1, 1880, to March 1, 1881.

We are of opinion that this ruling was erroneous. Although the defendant, under the contract by which he was engaged, was entitled to three months' notice in writing of the termination of the employment, he might waive this notice, and the employment might be terminated at any time by mutual agreement of the parties. When the lease was executed, both parties knew that the lessee would be in possession on December 1, 1880, and that the defendant's employment would then terminate. In view of these facts, the directors passed the vote granting the defendant $2000 extra compensation. Prima facie, at least, a part of the consideration of this grant was the termination of his employment when the lessees took possession. By accepting the amount granted, without reserving the right to claim additional damages, the defendant may have waived his right to the notice provided for in the contract.

If, as appears to be the fair inference from the evidence, the grant of $2000 was intended to be compensation to the defendant for the loss of his position on December 1, 1880, his acceptance of the grant was a waiver of his right to claim damages for the failure to give him the three months' notice. Taking the view most favorable to the defendant, it was a question of fact, upon the evidence, whether he had not thus waived his rights, upon which the plaintiff would, in a jury trial, have the right to go to the jury.

The ruling, therefore, that, as matter of law, the defendant was entitled, upon the evidence, to recover under his declaration in set-off, without passing upon this disputed question of fact, was error.

Exceptions sustained.

EMERY

v.

ST. LOUIS, KEOKUK AND NORTHWESTERN RY. CO.

(77 *Missouri Reports*, 339.)

In an action before a justice the defendant may recoup on account of any liability, whether in contract or tort arising out of or connected with the demand sued on, which goes to abate or reduce the amount claimed, by showing a partial failure of consideration, or that the damages are not as great as claimed by plaintiff. This is strictly a defensive recoupment and the justice has jurisdiction to entertain it, if he has jurisdiction of the plaintiff's demand to which it is an incident. But if the defendant asks to recoup on account of a cause of action existing in his favor, which admits the value and amount of the plaintiff's demand and assumes to oppose it by showing damages in his favor on this other cause of action, equal to or in excess of the plaintiff's demand, the court cannot entertain it by way of recoupment or counter-claim, unless it has jurisdiction to entertain the cause of action, upon which the cross damages are claimed. If the real character of the cross demand is such that the justice could not entertain jurisdiction of it, if the defendants were suing upon it, then he certainly cannot entertain it, when asserted by a defendant before him, however close it may appear to be connected with plaintiff's cause of action. Neither can the true character of the cross demand be changed by the defendant declining to ask judgment for any possible excess in his favor.

In an action before a justice of the peace upon an account for work and labor, the answer did not dispute the plaintiff's demand, but alleged damages to an engine, caused by plaintiff's negligence, in an amount exceeding the value of his services, and prayed that such damages to the extent of $90 might be recouped from plaintiff's demand, which was for a like amount, and asked judgment for costs. Upon the trial it was proven that all plaintiff's labor was performed by him while working under defendant's bridge carpenter, with the exception of one night's work in watching an engine, to which he had been specially detailed by one of defendant's master mechanics with the consent of the carpenter and with the understanding that he was to receive therefor credit for one day's work, and during this night the injury to the engine occurred. The trial court allowed the defendant its claim in reduction of damages to the extent of $50; a justice of the peace under the statute then in force (2 Wag. Stat., p. 808, § 3), having jurisdiction in cases of injury to personal property wherein the damages claimed did not exceed that sum. On appeal from this judgment, *Held*, that the injury to the engine was in no way connected with plaintiff's labor under the carpenter, and should not have been allowed in reduction of the value of his services beyond the value of the night's work upon the engine; that the defence set up should have been regarded as a cross action in tort for damages to personal property to the amount of $90, and that, so regarded, it exceeded the jurisdiction of the justice, and ought to have been dismissed or ignored in both the lower courts. *Held*, also, that the allowance of the counter-claim was an error against plaintiff, only, the respondent in this court; and that defendant by urging and receiving the benefit of such

claim to the extent of $50 could not complain if it had lost the remainder by its own fault.

Geo. F. Hatch and Geo. W. Easley for appellant.

Conceding that the code has no application to suits before justices of the peace, and that no affirmative relief can be sought in defenses of the character here set up, this case must still be reversed, for no affirmative relief was asked. No good reason can be assigned for saying to a defendant, you have sustained damages to a greater amount than your adversary sues you for, but he has sued you in a court that restricts you to defending beyond the sum of $50, and notwithstanding you are willing to surrender your claim in excess of his demand, and ask nothing therefor, we will let you have the benefit of your damages proven to the amount of $50, bar the remainder of your claim and give judgment against you. This would greatly multiply suits unnecessarily.

A. D. Lewis and N. Rollins for respondent.

The recoupment set up by defendant grows out of alleged injuries to personel property and exceeds $50. 2 Wag. Stat. 808, § 3; Webb *v.* Tweedie, 30 Mo. 488; Dillard *v.* St. L., K. C. & N. Ry. Co., 58 Mo. 60; Spencer *v.* Vance, 57 Mo. 427.

Martin, C.—This was an action for work and labor, commenced before a justice of the peace of Lewis county in November, 1876. The statement of the plaintiff, after being amended by leave of court, was in the form of an account specifying the number of days for which he claimed wages at the rate of $2 a day, and containing a credit for board, concluding with a balance in favor of plaintiff in the sum of $90. The defendant filed an answer to the original statement, which, according to a recital in the justice's transcript, consisted of a counter-claim in part. This counter-claim was stricken out on motion of plaintiff's attorney, for the reason that it exceeded the jurisdiction of the justice. This original answer was withdrawn by leave of court, and permission given defendant to file an amended answer. A motion requiring defendant to re-file the original answer, was overruled. It is not included in the record of the case.

The amended answer consisted of two parts. In the first, the defendant denied that it was a corporation, or that it was liable to be sued as a corporation, or body corporate, or as an individual or person in law. In the second part of the answer the defendant pleads, that in the performance of the work and labor for which plaintiff sues, it was implied in the law, understood and agreed, that plaintiff should perform such labor with reasonable skill, care and diligence; that he failed to use reasonable skill, care and diligence, but on the contrary, performed said labor in such a careless, unskillful and negligent manner, that by reason of the said carelessness, unskillfulness and negligence, the engines, cars and

tools of defendant, then in the keeping and under the control and management of plaintiff, suffered great loss, damage and injury in the sum of $90, and in a greater amount than all the value of plaintiff's services. The answer concludes with a prayer that the sum of damages and injury sustained by defendant by reason of the said careless, unskillful and negligent services, acts and conduct of the plaintiff, be recouped and deducted from the sum claimed by plaintiff, and that defendant have judgment for costs.

It will be observed that there is no denial of the plaintiff's cause of action in the answer, either as to the fact of the labor rendered or its value. The plaintiff filed a motion to strike out this claim of recoupment, and it was sustained by the justice to the extent of reducing the counter demand to $50. On trial before the justice a verdict was rendered in favor of plaintiff in the sum of $34.50, from which an appeal was taken to the circuit court by defendant. The plaintiff in that court renewed his motion to strike out the second part of defendant's answer. This motion was overruled, and the case was tried by the court without the intervention of a jury. When the case came up for trial in the circuit court, the defendant admitted the plaintiff's account, as presented in his petition below, to be correct, and asserted the right to prove the matters set out in his answer, as holding the affirmative of the issues on trial.

From the evidence in the record, it appears that the plaintiff was a workman for defendant at Alexandria, under the charge of one Graham, a bridge carpenter for defendant; that in the month of September, 1876, one Gorham, a master mechanic, reported to Graham that he was ill and had no watchman for his engine that night, a construction engine he had been using; that Graham informed him that he had in his employ the plaintiff, who had at Canton and other places been a "hostler" of engines; the duty of such a person was to take charge of engines as soon as they arrived, take them to the round-house and to prepare them in readiness to go out again; that the plaintiff was hunted up and introduced to Gorham, who told him what he wanted done, telling him that there were three gauges of water in the engine, and not to move the engine at all, and to have it ready by five or six o'clock in the morning; that plaintiff was seen the next morning at six o'clock; that he seemed intoxicated; that the engine was badly smashed up, the pilot and front end torn off, and one flat car pretty badly broken; that it appeared the engine had been run into the cars, with such rapidity and force, that when the forward end of the engine ran under the car, the increased pressure on the trucks of the engine had bent both rails under them; that when asked how it happened, plaintiff remarked that he was pumping her up, and said that he supposed he would be discharged; that upon taking charge of it, the plaintiff was to have credit for the

night's work as for a whole day, and that he received such credit; that there was no necessity for moving the engine, as far as witness knew.

A machinist by the name of Ambrose testified that the damage to the engine was at least $100; that water is pumped into the boiler of some engines by running the engine forward and backward, on the track; into others by an injector; the defendant had four engines of the first class mentioned, and two of the latter class; that if the engine stopped at five o'clock in the afternoon with a hot fire in the furnace, and stood till five or six o'clock in the morning, with the fire left up, it might blow off steam so as to require pumping before using the next morning. No evidence was introduced by the plaintiff.

The defendant asked the court to declare that if, while the plaintiff was in the employ of defendant, and in charge of the engine, he, without authority, unnecessarily moved the engine on the track, and in so doing carelessly caused great damage to it, in an amount equal to the amount of plaintiff's wages, then the damage to the engine so occasioned by the carelessness or negligence of the plaintiff is the proper subject of recoupment in this case, and the verdict should be for defendant. This declaration of law was refused by the court. The case was taken under advisement and judgment was rendered for the plaintiff in the sum of $38 and costs. The defendant saved its exceptions and brought this appeal.

It will be seen from this statement that the court, in its judgment, conceded to defendant the benefit of its claim in recoupment to the extent of $50, and interest, and denied all advantage over that amount.

The counsel for defendant insist that the cross demand pleaded in their answer, was in the nature of a deduction or diminution of the plaintiff's claim of $90 for labor, and that it should have been entertained and allowed by the court to its full extent, under the name of a defensive recoupment. After considering the pleadings and evidence, I am unable to accept this view of the case.

The nature of recoupment and counter-claim has received the attention of the Supreme Court of this State in a line of concurring decisions, and it is unnecessary to review the law on the subject, any farther than an intelligent application of well settled principles may require it. Grand Lodge *v.* Knox, 20 Mo. 433; Jones *v.* Moore, 42 Mo. 413; McAdow *v.* Ross, 53 Mo. 199; Ritchie *v.* Hayward, 71 Mo. 560. The term "recoupment" was anciently applied to the right of deduction from the damages claimed by plaintiff on account of part payment, depreciation or partial failure of consideration, or some analogous fact. 1 Dyer (2 b.); Coulter's Case, 5 Co. 31; Sedgwick on Dam. 431; Barber *v.* Chapin, 28 Vt. 413; Grand Lodge *v.* Knox, 20 Mo. 433; 2 Par.

Cont. 246; Waterman Offset, 468. This right in modern times has been recognized under the name of deduction or reduction of damages (Hecksher v. McCrea, 24 Wend. 304), which is probably the more proper name for it; while the meaning of recoupment has been greatly enlarged and changed. 2 Par. Cont. 246. Pomeroy Remedies, § 733. In modern times the term "recoupment" has been extended and applied to cross demands existing in favor of the defendant, and arising out of the same contract or transaction upon which the plaintiff founds his action.

After reviewing the old cases in Grand Lodge v. Knox, Judge Leonard remarks: "The American cases, however, at least in New York, Massachusetts, Alabama, and some few other states, now go the full length of declaring that all matters of counter-claim arising out of the same transaction, and not technically the subject of set-off, can be set-off by way of recoupment of damages, provided the plaintiff has been properly apprized of the defense." The courts differ in their views as to how the cross demand must arise from plaintiff's claim, or be connected with it. In some states a strict construction has been adopted, while in others a very liberal one prevails. Carey v. Guillow, 105 Mass. 18; s. c., 7 Am. Rep. 494; Chandler v. Childs, 42 Mich. 128; Ritchie v. Hayward, 71 Mo. 560. The question in this case is not whether the defendant's supposed right of recoupment or counter-claim is so connected with the plaintiff's cause of action as to be properly asserted in this case; but granting its sufficient connection with the cause of action, is it a defensive recoupment going merely to the depreciation of the consideration of the contract sued on, or is it a well defined cause of action for an injury to personal property, laid alongside of the admitted value of the plaintiff's services with the object of overtopping it in amount?

The growing principle of recoupment was recognized by the legislatures of many of the states, including our own, and under the name of counter-claim it was so enlarged as to give the defendant the benefit of the difference between his cross demand and the plaintiff's claim, when the excess should prove to be in his favor. Chandler v. Childs, 42 Mich. 128. The counter-claim of our Practice Act includes everything which in modern times goes under the name of recoupment proper, as well as much more; for it extends to offsets and many cross actions not in any way connected with the plaintiff's demand. Pomeroy Remedies, § 736; Flesh v. Christopher, 11 Mo. App. 483; Gordon v. Bruner, 49 Mo. 570; Conner v. Winton, 7 Ind. 523; Pattison v. Richards, 22 Barb. 146. But no right of recoupment as understood in modern times, or counter-claim, can exist in the absence of a cause of action in favor of the defendant. A cross action is always implied in its terms. Pomeroy Remedies, § 733; Carey v. Guillow, 105 Mass. 18; Clark v. Wildridge, 5 Ind. 176; Vassear v. Livingston,

13 N. Y. 257; White *v.* Reagan, 32 Ark. 281. When it falls short of constituting a cause of action, it belongs to the class of partial defenses in reduction or mitigation of damages, and ought to go by the name of reduction of damages. Pomeroy Remedies, § 733; Moffet *v.* Sackett, 18 N. Y. 522.

It is undoubtedly true that when the plaintiff sues for the price of labor the defendant is at liberty to recoup against his claim, any damages suffered through the negligence of the plaintiff whereby the value of the consideration was depreciated. Eaton *v.* Woolly, 28 Wis. 628; Pomeroy Remedies, § 732. It was in this class of cases, the modern use of the term recoupment was first recognized in England in a restricted sense. But in such cases it will be found that a valid cross action existed in favor of defendant, and in the use of it he was often confined to such damages as depreciated the value of the consideration.

Now it is clear to my mind that the injury complained of by defendant in this case, does not fall within the meaning of the term "recoupment" as anciently understood. It does not contain matter simply reducing the plaintiff's damages, or depreciating the consideration received by defendant for the promised wages. According to the plaintiff's account he was suing for 25½ days' labor in July, 23½ days in August, and four days in September. He was to receive a credit of one day's labor for the single night's work in watching the engine, for which he was specially detailed by Graham, the bridge carpenter. It does not appear satisfactorily that the night's labor in watching the engine was included in his account as one of the four days in September. But granting that one of the last four days in the account included this night's work, it is clear that all the balance of his demand is for labor rendered by him, while a laborer under Graham, the bridge carpenter. The defendant had received the full benefit of all his labor, before the plaintiff was specially detailed as a "hostler" to take care of the engine. The injury to the engine was in no way connected with the balance of this labor. No negligence can be imputed to him in respect to it, and the injury to the engine cannot in any fair sense of its connection with his services, be accepted in reducton or depreciation of the value of his labor while helping the bridge carpenter. As a depreciation of the consideration, for which he sues in this case, it could not extend beyond the $2 which he was to be paid for the night's work in watching the engine.

But the claim in recoupment is not asserted for this limited purpose. The defendant admits of record that the plaintiff is entitled to these $2, if it is included in the account, as he unquestionably is to his labor under the bridge carpenter. The answer contains a well pleaded cause of action for injury to personal property, by reason of the negligence of the plaintiff. Whether you call this "recoupment" or counter-claim, it certainly is not in the

nature of a defensive recoupment or counter-clain, in reduction of damages, by depreciating the value of the consideration received, or cutting down the damages claimed, because the services rendered were not as valuable as contracted to be. Whether the plaintiff sues for his wages or not, this cause of action exists in favor of defendant. It was a matter of choice with defendant, whether it should be prosecuted by being laid along-side of the plaintiff's claim for damages, or asserted in an independent action. In either case the effect would be the same.

I am unable to regard it in any other light than a cross action in favor of defendant to the extent of $90, at least, for an injury to the defendant's engine. Holding the relation of employee to the defendant on the night of the injury, the law, and not the contract, imposed the duty to be careful in all that he did; negligence on his part was a violation of this duty, which resulted in an injury to the defendant's personal property, for which he is responsible in law to its full extent. It sounds in tort and is not in the nature of an action ex contractu, nor could it, as a cross claim, be measured by the consideration of the contract sued on by the plaintiff. Its true character cannot be escaped by pleading it in the form of an assumpsit, even though the defendant had attempted that. Chandler *v.* Childs, 42 Mich. 128; Carey *v.* Guillow, 105 Mass. 18. I regard the defendant in this case as seeking to avail himself of the benefit of a modern recoupment or counter-claim, on account of a well defined cause of action for injury to personal property.

If our Practice Act relating to counter-claims applies to actions before justices, then this claim of defendant for $90, or more, for injury to the engine was clearly beyond the jurisdiction of the justice. It ought to have been dismissed or entirely ignored in both of the lower courts. The circuit court seems to have allowed it to the extent of $50 and interest. This was an error against the plaintiff, but he is not a complainant in error here. The defendant has no right to complain. After the court, by refusal of defendant's instruction, had indicated that the claim for $90 was beyond the jurisdiction governing such claims, the defendant ought to have dismissed it. By retaining it in court as pleaded, the defendant has received the benefit of one half of it. If the other half is lost, it is his own fault. When cross demands are not within the jurisdiction of the court, the defendant is not entitled to the benefit of any part of them. Almeida *v.* Sigerson, 20 Mo. 497; Reed *v.* Snodgrass, 55 Mo. 180.

If the provisions in the Practice Act relating to counter-claims do not apply to practice before justices of the peace, which is probably true (Flesh *v.* Christopher, 11 Mo. App. 483; R. S. 1879, § 3522), and which seems to be conceded by defendant's counsel, then the defendant's counter-right must be supported, if at all, as a defensive recoupment, or mere right of reduction of damages. And

as in the form in which it is pleaded and proved, it is clearly a cross action in favor of the defendant for an injury to personal property to the extent of $90 at least, and not the mere right of reduction of damages by reason of a depreciation of the consideration received by defendant in the labor sued for, it cannot be entertained without in substance entertaining a counter-claim sounding in tort, which is not authorized by law.

The conclusion I have reached may be briefly stated: In an action before a justice the defendant may recoup on account of any liability, whether in contract or tort, arising out of or connected with the demand sued on, which goes to abate or reduce the amount claimed, by showing a partial failure of consideration, or that the damages claimed are not as great as claimed by plaintiff. This is strictly a defensive recoupment, and the justice has jurisdiction to entertain it, if he has jurisdiction of the plaintiff's demand to which it is an incident. But if the defendant asks to recoup on account of a cause of action existing in his favor, which admits the value and amount of plaintiff's demand and assumes to oppose it by showing damages in his favor on this other cause of action, equal to or in excess of the plaintiff's demand, the court cannot entertain it by way of recoupment or counter-claim, unless it has jurisdiction to entertain the cause of action upon which the cross damages are claimed. If the real character of the cross demand is such that the justice could not entertain jurisdiction of it if the defendant were suing upon it, then he certainly cannot entertain it when asserted by a defendant before him, however close it may appear to be connected with plaintiff's cause of action. Neither can the true character of the cross demand be changed by the defendant declining to ask judgment for any possible excess in his favor.

The convenience and policy of having all cross demands settled in the same case, cannot justify the defendant in bringing a cross demand for settlement in a justice's court which has no jurisdiction of it, either because it sounds in tort, and exceeds the amount which limits the jurisdiction of a justice in such actions, or because no unliquidated counter-action can be entertained by a justice of the peace.

For these reasons, I am of the opinion that there is no error in this record which the defendant has any right to complain of. Accordingly, the other commissioners concurring, the judgment is affirmed.

HARLAN
v.
ST. PAUL, M. AND M. RY. CO.

(*Advance Case, Minnesota. January* 28, 1884.)

In an action brought upon contract for services, the defendant may plead, by way of recoupment and set-off, damages sustained by him through the negligence of plaintiff in the performance of the same contract of employment upon which the action is brought, and if the balance be found in his favor he may have judgment against the plaintiff for the amount thereof.

An order striking out an answer being an appealable order, and forming part of the record, need not be excepted to in order to entitle the appellant to have it reviewed.

APPEAL from judgment of St. Paul municipal court.

Erwin & Ryan, for respondent, William S. Harlan.

R. B. Galusha, for appellant, the St. Paul, M. & M. Ry. Co.

MITCHELL, J.—Plaintiff brought this action to recover for services rendered to defendant as brakeman on its railroad. The defendant, in its answer, set up "by way of defense and counterclaim" damages sustained through the negligent performance by plaintiff of the same contract of employment upon which the action is brought. This could be done, independent of any statute, under the common-law doctrine of recoupment. It was well settled, upon common-law principles, that where the defendant has sustained damages by reason of the plaintiff's non-performance of his part of the agreement sued on, such defendant has the right to abate the plaintiff's claim by the amount of such damages. 3 Wait, Act. & Def. 610; 7 Wait, Act. & Def. 544. If the defendant can show that the plaintiff himself has violated some stipulation of the same contract sued on, he may recoup his damages arising from such breach, whether they be liquidated or unliquidated. Damages incurred by the defendant through the negligence of the plaintiff in the performance of the contract of employment sued on, might be thus interposed by way of recoupment. Wat. Set-off, §§ 535, 536. Our statute has extended this right so that now a defendant may plead such damages, not merely in reduction or bar of plaintiff's claim, but also so that if the balance be found in his favor he may have affirmative judgment for the amount against the plaintiff. The court, therefore, erred in striking out the second defense in defendant's answer.

An order striking out an answer being an appealable order, which constitutes a part of the record, need not be excepted to in order to entitle the appellant to have it reviewed. Ely *v.* Titus, 14 Minn. 125 (Gil. 93).

Judgment reversed, and new trial ordered.

WHITE
v.
MIDDLESEX R. R. CO.

(135 *Massachusetts Reports*, 216.)

An agreement between a corporation and a person entering its employ provided that the employee should deposit a certain sum of money with the corporation, as security for the proper discharge of his duties; that the president of the corporation should be the sole judge between the corporation and the employee whether the corporation was entitled to retain the whole or any part of the deposit, and that his certificate in writing that the whole or any part of said sum was to be so retained and forfeited to the corporation should be conclusive evidence between the parties, in all courts of justice, that the amount thereby forfeited was so forfeited, and should bar the employee of all right, under any circumstances, to recover the money so certified to be forfeited. *Held*, in an action by the employee against the corporation to recover the sum so deposited, that the latter clauses were an agreement to submit to arbitration and an attempt to oust the courts of jurisdiction, and were void.

CONTRACT, for money had and received, to recover $65, deposited by the plaintiff with the defendant corporation under a written agreement providing, among other things, that the plaintiff, who was about to enter the defendant's employ as a conductor, should, upon entering such employ, deposit the sum of $65, to be retained by the defendant, together with interest accrued thereon and all wages that might be due him, as security for the proper discharge of his duties, for the due accounting for and paying over to the defendant of all fares received, and for the due observance by him of all the rules and regulations of the defendant; that, in case of a breach by the plaintiff of any of said rules and regulations, the defendant might retain the whole of said deposit and any interest thereon, and the amount of wages that might be due him, as liquidated damages, for such breach; and that the defendant's president "shall be the sole judge between the company and the conductor whether the company is entitled to retain the whole or any part of said $65 and interest, and all wages that may at any time be due him, as liquidated damages. And his certificate in writing that the same or any given part thereof, stated in such certificate, are to be so retained and forfeited to the company, and of the cause of such retention, shall be a final adjudication thereof, binding and conclusive evidence between the parties in all courts of justice, civil and criminal, both that the amount thereby certified as the true amount to be forfeited and retained has become and is so forfeited and retained by the company, and that that has happened which in such certificate is certified to be the cause, and

that it is a lawful and sufficient cause for such retention; and such certificate shall bar the conductor of all right, under any circumstances, to recover the moneys so certified to be forfeited and retained, or any part thereof."

The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court on appeal, upon agreed facts, in substance as follows:

The defendant received said $65 under said agreement, and the only claim the defendant has to such money is by virtue of the agreement and the president's certificate indorsed thereon, as follows: "By virtue of the written agreement, and under the power therein conferred upon me, I, Charles E. Powers, president of said Middlesex R. R. Co., do hereby adjudge and decide that said railroad company is entitled to retain the whole of the $65 deposited with it under said agreement, together with all the interest thereon, and the same is hereby declared to be forfeited to the said railroad company on account of the breach by the within-named Augustine K. White, conductor, of the fourth clause of said agreement [which related to the faithful discharge of his duties as conductor] and of the sixty-fifth and sixty-sixth rules and regulations of the Middlesex R. R. Co."

The rules and regulations above referred to were as follows:

"65. The punch must be used to cancel and record a fare for each and every person over three years of age who rides upon the car. 66. As soon as fare has been received from one person the punch must be used in the presence of such person, to record such fare or fares, before another one is taken up. Failure to comply with this rule, in every instance, will be positive cause of dismissal."

The plaintiff contends that this money should be paid to him for the reason that the agreement was, on its face, unconscionable and void, and against public policy.

The defendant contends that the agreement was valid, legal and final between the parties.

If the court should be of opinion that the agreement was void, judgment was to be entered for the plaintiff; if it was valid, judgment for the defendant.

L. M. Child, for the defendant.

J. F. Pickering and J. W. Pickering for the plaintiff.

Field, J.—If the parties had an opportunity to appear and be heard before the president of the company, and the plaintiff had appeared and been heard, and an award had been actually made that nothing was due the plaintiff, this award would be a bar to the action, unless for some cause it was impeached. The fact that the arbitrator was an officer of the defendant corporation, as it was known to the plaintiff when he signed the agreement, would not

invalidate the award. But it does not appear by the agreed statement of facts that any hearing was ever had before the president, or that the company ever made any claim before him that the plaintiff had not fully performed his duties, or that the plaintiff ever had any notice that the company made any such claim, and that the president would proceed to hear the parties, and adjudicate upon the question whether the company had the right under the agreement to retain the whole or any part of the $65.

By the agreed facts, it appears that the contention between the parties is not upon an award, but upon the agreement, whether it is valid or void; and that, if the court is of opinion that the argeement is void, judgment is to be entered for the plaintiff; if it is valid, judgment to be for the defendant. The principal contention in argument on the part of the company is, that this is not an agreement to arbitrate, but an agreement that the company may retain the whole of the $65, or such part as the president may adjudge, and that, until the president has adjudged that the whole or some part is due to the plaintiff, no action at law can be maintained by him.

London Tramways Co. *v.* Bailey, 3 Q. B. D. 217, is almost identical with the case at bar, and the judgment was for the company. See also Wilson *v.* Glasgow Tramways & Omnibus Co., 5 Sc. Sess. Cas. (4th ser.) 981, and Glasgow Tramway & Omnibus Co. *v.* Dempsay, 3 Coup. Just. 440. The decision in London Tramways Co. *v.* Bailey, ubi supra, was by Mellor and Lush, JJ., and is put upon the ground that the "agreement is very like the stipulation that the certificate of an architect or engineer shall be conclusive." It seems to be the doctrine of the English courts, that agreements prohibiting a party from bringing an action, or purporting to oust the courts entirely of their jurisdiction, are void; that, in contracts in which it is a condition precedent to the right to maintain an action that there shall first be a reference and an award, no action can be maintained until this condition has been complied with, unless, indeed, it becomes impossible to comply with it; but if the stipulation to refer to arbitration is collateral to the other stipulations of the contract, an action can be maintained upon the contract without a reference. Babbage *v.* Coulburn, 9 Q. B. D. 235; Edwards *v.* Aberayron Ship Ins. Society, 1 Q. B. D. 563; Dawson *v.* Fitzgerald, 1 Ex. D. 257; Hope *v.* International Financial Society, 5 Ch. D. 327; Scott *v.* Liverpool, 3 DeG. & J. 334; Horton *v.* Sayer, 4 H. & N. 643.

Scott *v.* Avery, 5 H. L. Cas. 811, left it uncertain whether, if in a contract the agreement to submit to arbitration is a condition precedent to maintaining the action, and includes all disputes that may arise under the contract, and is not confined to questions which affect the amount of damages, it is, or is not, void. The cases we have cited show that English judges do not yet agree in

opinion on this question. The inclination of this court has been to regard such an agreement as void. Cobb v. New England Ins. Co., 6 Gray, 192; Rowe v. Williams, 97 Mass. 163; Wood v. Humphrey, 114 Mass. 185; Pearl v. Harris, 121 Mass. 390; Vass v. Wales, 129 Mass. 38. See also Trott v. City Ins. Co., 1 Cliff. 439; Mansfield v. Doolin, I. R. 4 C. L. 17.

If such an agreement in a contract is not void as contrary to the policy of the law, the whole doctrine amounts to this, that courts will not specifically enforce the agreement, but will treat it as valid, and as a condition precedent, or as an independent stipulation, according to the construction given to the contract.

The agreement in this case seems to us an attempt to oust courts entirely of jurisdiction over the question whether the defendant is entitled to retain the whole, or some part, of the $65, as liquidated damages, for a breach of the contract. It regards this sum, or such part of it as the president may determine, as forfeited by the plaintiff, if the president shall so certify.

In Hope v. International Financial Society, ubi supra, the defendant contended that the plaintiff had no standing in court, because he had forfeited his shares under the articles of association, by taking legal proceedings against the company; but Lord Justice James said, "We cannot listen to that argument. Any stipulation that a shareholder shall not appeal to a court of justice must be bad." 4 Ch. D. 334.

In London Tramways Co. v. Bailey, ubi supra, no cases were cited by the court, and only Brown v. Overbury, 11 Exch. 715, and Scott v. Avery, ubi supra, were cited by counsel. Brown v. Overbury was an action to recover the stakes at a steeple chase, when the stewards, who, by the articles, were to decide the race, had met and were unable to decide whose horse had won; and it was held that it was a condition precedent to the plaintiff's right to recover, that he obtain the judgment of the stewards, is practicable. Baron Alderson said: "Every contract must be determined according to the circumstances belonging to it. This is one of racing, and the universal practice has been, that, in order to ascertain who is to have the stakes, it must first be determined who is the winner, not in the opinion of the jury, but of the persons appointed to decide it, viz. the judges or the stewards." The court do not decide what the effect would be if it became impossible to obtain a decision from the stewards. There is, we think, notwithstanding what was said by Lord Campbell in Scott v. Avery, ubi supra, little analogy between that case and the case at bar. Neither do we think that this agreement is like a building contract, in which the decision and certificate of an architect or engineer, upon the quantity or quality of the work done, is a condition precedent to the plaintiff's maintaining his action for the price. Such a stipulation in a building contract is not regarded as strictly an

agreement to submit to arbitration. Wardsworth *v.* Smith, L. R. 6 Q. B. 332; Palmer *v.* Clark, 106 Mass. 373. No hearing of the parties is usually contemplated. The matters to be examined relate to things that are visible and can be determined by appraisal, inspection, measurement, or other similar methods, and pertain solely to the performance of the work to recover the price of which the plaintiff brings his action, and it is an irrevocable part of such contracts that the plaintiff shall recover only upon the condition that the architect or engineer certifies that the work has been done according to the contract, or shall only recover for extra work whatever the architect or engineer estimates the value of it to be, or shall recover only if the work is done to the satisfaction of the architect or engineer.

This is not a suit for wages; and, if it were, the plaintiff is not, by his agreement, required to perform his duties to the satisfaction of the president of the company, and there is no stipulation that the plaintiff shall recover as wages only such sum as the president may determine. This is a suit to recover a deposit. If the defendant claims the right to retain it, as liquidated damages, for a breach of the agreement by the plaintiff, the burden is on the defendant to prove the breach. If a controversy arises upon the questions whether there has been such a breach, and whether the company has the right to retain the deposit, as liquidated damages, for such breach, there is a stipulation that the president shall be the sole judge of it, and that his certificate shall be a final adjudication of it. Such a stipulation is, we think, an agreement to submit to arbitration, and an attempt to oust courts of justice of all jurisdiction over the whole controversy, and is void.

In the opinion of a majority of the court, the judgment must be affirmed.

MARRIER

v.

ST. PAUL, M. AND M. RY. CO.

(*Advance Case, Minnesota. January* 5, 1884.)

Section men under the charge of a section foreman were in the employment of a railroad company in repairing its railroad track. Their work being, on the day in question, distant from their boarding-house, they carried their dinner with them. When they quit work at noon to eat it, they kindled a fire on the company's right of way for the purpose of warming their coffee. After eating, they resumed work, negligently leaving the fire unextinguished, which subsequently spread and ran to plaintiff's land and destroyed his property. There was no evidence that the company was

boarding these men, or that it was any part of its duty to prepare their meals, or that the company either knew of or authorized the kindling of a fire for any such purpose. Nor was there any evidence that these section men had any supervision over the right of way, or that it was any part of their duty to extinguish fires that might be ignited thereon. *Held*, that the railroad company was not liable; that in kindling this fire to warm their meals the men were not acting in the course or within the scope of their employment in connection with the company's business; but, for the time being, were acting for themselves and as their own masters, and exclusively pursuing their own ends; and hence the act was their own personal act, and not that of the company. Neither was it material that the section foreman assisted in or directed the act. In doing so he was as much his own master and doing his own business as were the section men.

APPEAL from an order of the district court, Polk county, denying new trial.

R. Reynolds, for respondent.

R. B. Galusha and P. A. Dufour, for appellant.

MITCHELL, J.—All the evidence in this case tends to prove that some section men, under the charge of a section foreman, were, in the employment of defendant, engaged in repairing its railroad near defendant's farm, on the 21st of October, 1882. While engaged in such work they usually returned to their boarding-house for dinner, but on this day, their work being at some distance, they took their dinner with them. At noon, when they quit work to eat, they built a fire, or rekindled one which some other person had kindled, on defendant's right of way, for the purpose of warming their coffee. After eating dinner, they resumed their work, negligently leaving the fire unextinguished, which spread in the grass and ran on to plaintiff's land and burned his hay. There is no evidence that the defendant was boarding these men, or that it was any part of its duty to prepare or cook their meals. Neither is there anything tending to show that the defendant either knew or authorized the kindling of a fire for any such purpose, either on this or any other occasion. Nor is there any evidence that it was the duty of these section men to exercise any supervision over the right of way, or to extinguish fires that might be ignited on it. So far as the evidence goes, their employment was exclusively in repairing the railroad track.

The doctrine of the liability of the master for the wrongful acts of his servants is predicated upon the maxims, "respondeat superior" and "qui facit per alium facit per se." In fact, it rests upon the doctrine of agency. Therefore, the universal test of the master's liability is whether there was authority, express or implied, for doing the act; that is, was it one done in the course and within the scope of the servant's employment? If it be done in the course of and within the scope of the employment, the master will be liable for the act, whether negligent, fraudulent, deceitful, or

an act of positive malfeasance. Smith, Mast. & Serv. 151. But a master is not liable for every wrong which the servant may commit during the continuance of the employment. The liability can only occur when that which is done is within the real or apparent scope of the master's business. It does not arise when the servant steps outside of his employment to do an act for himself not connected with his master's business. Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. A master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment. And in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master, pro tempore, the master is not liable. If the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities. 2 Thomp. Neg. 885, 886; Serg. & R. Neg. §§ 62, 63; Cooley, Torts, 533 et seq.; Little Miami R. Co. *v.* Wetmore, 20 Ohio St. 110; Storey *v.* Ashton, L. R. 4 Q. B. 476; Mitchell *v.* Crasweller, 13 Com. B. 236; McClenaghan *v.* Brock, 5 Rich. Law. 17.

It would seem to follow, as an inevitable conclusion, from this, that on the facts of this case the act of these section men in building a fire to warm their own dinner was in no sense an act done in the course of and within the scope of their employment, or in the execution of defendant's business. For the time being they had stepped aside from that business, and in building this fire they were engaged exclusively in their own business, as much as they were when eating their dinner, and were for the time being their own masters as much as when they ate their breakfast that morning or went to bed the night before. The fact that they did it on defendant's right of way is wholly immaterial, in the absence of any evidence that defendant knew of or authorized the act. Had they gone upon the plaintiff's farm and built the fire the case would have been precisely the same. It can no more be said that this act was done in the defendant's business, and within the scope of their employment than would the act of one of these men in lighting his pipe, after eating his dinner, and carelessly throwing the burning match into the grass. See Williams *v.* Jones, 3 Hurl. &

C. 256. The fact that the section foreman assisted in or even directed the act does not alter the case. In doing so he was as much his own master and doing his own business as were the section men. Had it appeared that it was part of his duty to look after the premises generally, and extinguish fires that might be ignited on them, his omission to put out the fire might possibly, within the case of Chapman v. N. Y., P. R. Co., 33 N. Y. 369, be considered the negligence of the defendant. But nothing of the kind appears, and the burden is upon plaintiff to prove affirmatively every fact necessary to establish defendant's liability.

Order reversed, and new trial granted.

See Gilliam v. South & North Alabama R. R. Co., and note, infra; Denver & Rio Grande R. R. Co. v. Harris, and note, infra.

GILLIAM
v.
SOUTH AND NORTH ALABAMA R. R. CO.

(70 *Alabama Reports*, 268.)

The rule o. the common law, held the master responsible for an injury done by the negligent act of his servant in the performance of his service, but not for an intentional wrongful act of his servant, unless commanded or adopted by him; but this rule, as applicable to railroad corporations, has been modified by the more modern cases; and this court adopts the modified rule, which holds the master or principal responsible for the intentional tortious act of his agent or servant, when (and only when) done within the range of his employment.

"It is common knowledge," that if the conductor of a passenger train stops his train, pursues a boy on foot into his father's house, with a pistol in his hand, seizes the boy, and carries him off on the train, these wrongful acts are not within the range of his employment; consequently, the railroad company is not liable in damages for such wrongful acts, without averment and proof that it commanded, authorized, or ratified them.

APPEAL from the Circuit Court of Blount.

Tried before the Hon. John Henderson.

This action was brought by James T. Gilliam against the appellee, a domestic railroad corporation; and was commenced on the 6th December, 1878. The original complaint contained two counts, each claiming $25,000 damages, "for wrongful and unlawful injuries to plaintiff committed by defendant," as follows: 1. "Whereas, heretofore, to wit, on the 10th day of November, 1878, the north-bound passenger train of defendant was stopped at or near plaintiff's house, not a regular stopping-place for said train, and the conductor thereof, one Matt Hunt,

with other servants of defendant, employed by defendant for the purpose of controlling and protecting the defendant's train, and performing generally the duties and service of a conductor of said train, and while engaged in the performance of said service, came from said train, upon the premises and into the house of said plaintiff, with pistols in their hands, and, to the great danger and alarm of plaintiff's family, seized William Gilliam, a minor child of plaintiff, and forced him to enter defendant's said passenger train, and, under pretense of protecting said passenger train from said William, plaintiff's minor child, him, the said child, carried away upon defendant's said train to the next station on said road. Wherefore, plaintiff says he has been damaged," etc. 2. Whereas, on the 10th November, 1878, "one Matt Hunt, a servant of defendant, employed for the purpose of managing and controlling the passenger train of defendant, and for receiving and protecting passengers thereon, and denominated the conductor of said train, and being then engaged in the defendant's service as such servant, caused the defendant's said train to stop at or near plaintiff's house, and, under pretense of protecting the defendant's property and the passengers on said train, entered upon plaintiff's premises, and into his house, armed with a pistol, and, to the great alarm of plaintiff's family, and despite their entreaties, took plaintiff's minor son, William Gilliam, then in the plaintiff's service, and who was in no way endangering the defendant's property, nor the passengers on said train, and him forcibly carried into the said passenger train, away from the service of plaintiff. Wherefore, plaintiff says he is injured," etc.

The court sustained a demurrer to each of these counts, and the plaintiff then filed, by leave of the court, an amended complaint, or additional count, claiming damages as before, for that whereas, on the 10th November, 1878, "one Matt Hunt, a servant of defendant, employed for the purpose of running and controlling the passenger trains of defendant, and for receiving and protecting passengers thereon, denominated the conductor of said train, being then in the defendant's service, as such servant, and whilst acting in the course of his employment as such servant, caused the said train to stop at or near the plaintiff's house, and entered upon the premises of plaintiff, and into his house, armed with a pistol, and, to the great alarm of plaintiff's family, and despite their entreaties, took plaintiff's son, a minor child, named William, then in plaintiff's service and who was plaintiff's servant, and was in no way endangering the defendant's property, nor the passengers on said train, and carried him into said passenger train, away from the plaintiff's service, to the next station on said road. Wherefore, plaintiff says he has sustained damages," etc. To this count, also, the court sustained a demurrer.

The judgments on the demurrers are now assigned as error.

B. Randolph, for appellant, cited Redfield on Railways, §§ 130, 375; 5 Wait's Actions and Defenses, 331; Railroad Co. v. Rogers, 38 Indiana, 116; Duggins v. Watson, 4 Ark. 127; Railroad Co. v. Derby, 14 How. U. S. 468; Railroad Co. v. Harmon, 47 Illinois, 298; Rex v. Dixon, 4 Campb. 124; Rounds v. Railroad Co., 64 N. Y. 129; Shear. & Redf. on Negligence, § 66; Railroad Co. v. Anthony, 43 Illinois, 183; Courtney v. Baker, 60 N. Y. 1.

Thos. G. Jones, contra.

STONE, J.—The present case presents but a single inquiry: whether the railroad company is liable in damages for the wrong alleged to have been committed by Hunt, the conductor. The case of McManus v. Crickett, 1 East, 106, is the leading authority on this question. That case drew the distinction between willfulness and negligence, holding that when the servant, in the performance of his master's service, by his negligent act, does an injury to another, the master is liable in damages; when, however, the act which produced the injury was intentionally done, although done while in the performance of his master's service, then the master was not liable, unless he commanded the act, or was present and did not dissent from it.

The rule, as stated above, has never been fully satisfactory. Since railroads have been introduced, and since they have monopolized, in large degree, the land travel and transportation of the country, many of the revising courts of the country have modified the rule. The modification, however, is confined to acts which are within the range of the agent's employment, or delegated authority. The precise modification is, that if the agent, while acting within the range of the authority of his employment, do an act injurious to another, either through negligence, wantonness, or intention, then, for such abuse of the authority conferred upon him, or implied in his employment, the master or employer is responsible in damages to the person thus injured. But, if the agent go beyond the range of his employment or duties, and of his own will do an unlawful act injurious to another, the agent is liable, but the master or employer is not. 1 Redf. on Railways, 5th ed. § 130, subd. 4, note 6; Pierce on Railways, 277-8; 5 Wait's Ac. & Def. 311-2; Flower v. Penn. R. R. Co., 69 Penn. St. 210; s. c., 8 Amer. Rep. 251; N. O., J. & Gr. Nor. R. R. Co. v. Harrison, 48 Miss. 112; s. c., 12 Amer. Rep. 356; Shearm. & Redf. on Negligence, § 65; Poulton v. Lon. & S. W. Ry. Co., 2 Q. B. 534; Storey v. Ashton, 4 Q. B. 476; Phila. & Read. R. R. Co., 14 How. 468; Rounds v. Del., Lack. and W. R. R. Co., 64 N. Y. 129; Cohen v. Dry Dock, East Broadway & B. R. R. Co., 69 N. Y. 170; Coleman v. N. Y. & N. H. R. R. Co., 106 Mass. 160; Lit. Miami R. R. Co. v. Whitman, 19 O. St. 110; Tol., Wab. & W. R. R. Co. v. Harmon, 47 Ill. 298; Jef. R. R.

Co. *v.* Rogers, 38 Ind. 116; Hays *v.* Houston, G. N. R. R. Co., 46 Texas, 272.

The older cases follow the doctrine declared in McManus *v.* Crickett, supra, and relieve the master or employer from liability for tortious acts of the agent, if intentionally done, although within the range of his duties, unless the tortious act was commanded or adopted by the master. Foster *v.* Essex Bank, 17 Mass. 479; Southwick *v.* Estes, 7 Cush. Mass. 385; Harris *v.* Nicholas, 5 Mumf. 483; Wright *v.* Wilcox, 19 Wend. 343; Vanderbilt *v.* Rich. Turnpike Co., 2 Comst. 479; Puryear *v.* Thompson, 5 Humph. 397; Ill. Cen. R. R. Co. *v.* Downey, 18 Ill. 259; Wesson *v.* Seaboard & Roanoke R. R. Co., 4 Jones' Law, 379; Church *v.* Mansfield, 20 Conn. 284; Thames Steamboat Co. *v.* Housatonic R. R. Co., 24 Conn. 40; DeCamp *v.* Miss. & Mo. R. R. Co., 12 Iowa, 348.

In S., R. & D. R. R. Co. *v.* Webb, 49 Ala. 240, this court held that a railroad company cannot be sued in trespass for the willful tort of its employee, unless the act was previously ordered, or subsequently ratified by the corporation. We think the principle there announced should be so far modified, as to limit its application to tortious acts of the agent, done outside of the range of his employment. To this extent, we adopt the modified rule, as applicable to railroads and their employees.

It is common knowledge, that the wrongful acts charged in this case to have been done by the conductor, are not within the range of his employment. There is no averment that the act was commanded, or authorized by the corporation, or that it ratified it afterwards. The Circuit Court did not err in sustaining the demurrer to each count of the complaint.

Affirmed.

Company not Liable for Wilful and Malicious Act of Servant.—Notwithstanding the strong current of late authority is to hold a railroad company liable for every act of its servants, it is conceived that where an act is done without any view to the company's service but purely out of malice, the company is not liable. Whether or not the act in question is purely voluntary and outside of the scope of the servant's duty is for the jury. Cohen *v.* Dry Dock, E. B. & B. R. Co., 69 N. Y. 170; Bounds *v.* Delaware, L. & W. R. Co., 64 N. Y. 129; Jackson *v.* Second Ave. R. R. Co., 47 N. Y. 274; Chicago & N. W. R. Co. *v.* Bayfield, 37 Mich. 205; DeCamp *v.* Mississippi & M. R. Co., 12 Iowa, 348.

Some acts are held to be so clearly independent and outside of the scope of a servant's duty that they will be so pronounced by the court. The company clearly cannot be held liable in these cases. Thames Steamboat Co. *v.* Housatonic R. R. Co., 24 Conn. 40; Isaacs *v.* Third Avenue R. R. Co., 47 N. Y. 122; Stewart *v.* Brooklyn Cross-town R. R. Co., 9 Rep. 759; Snyder *v.* Hannibal & St. Joe R. Co., 60 Mo. 412; Little Miami R. Co. *v.* Wetmore, 19 Ohio St. 110; Pittsburg, etc., R. Co. *v.* Donohue, 70 Pa. St. 119; New Orleans, etc., R. Co. *v.* Harrison, 48 Miss. 112; Phila., G. & N. R. Co. *v.* Wilt, 4 Whart. (Pa.) 143; Illinois Central R. Co. *v.* Downey, 18 Ill. 259; Evansville & C. R. Co. *v.* Baum, 26 Ind. 70; Marion *v.* Chicago, etc., R. Co.,

8 Am. & Eng. R. R. Cas. 177; Marrier v. St. Paul, M. & M. R. Co., supra. And see Nashville & C. R. Co. v. Starnes, 9 Heisk, 52; T. H. & I. R. Co. v. Jackson, 6 Am. & Eng. R. R. Cas. 178; Chicago City R. Co. v. McMahon, 8 Am. & Eng. R. R. Cas. 68; Denver & Rio Grande Ry. Co. v. Harris, and note, infra.

DENVER AND RIO GRANDE RY. CO.

v.

HARRIS.

(*Advance Case, New Mexico. January*, 1884.)

Although a railroad company by its officers cannot legally authorize or sanction a wrongful act, yet if it does in fact authorize or sanction such act, the company will be liable therefor.

Certain agents and employees of the D. & R. G. R. Co., under its vice-president and assistant general manager, attacked the agents and employees of the A. T. & S. F. R. Co., of whom A. was one, with pistols and other deadly weapons, and took forcible possession of the road of the latter company, using it thereafter as their own. In the course of the contest, A. was wounded by a pistol shot, fired by one of the D. & R. G. R. Co's employees. In a suit by A. against the latter company to recover damages, *held*, that there was evidence to go to the jury to establish the liability of the company defendant.

Although the court is forbidden by statute to modify instructions by erasure or interlineation, yet an erasure not prejudicial to the party complaining thereof forms no valid ground for reversal of the judgment.

William Breeden, for plaintiff in error.

C. H. Gildersleeve and John H. Knaebel, for defendant in error.

BRISTOL, J.—This case is here on writ of error to the district court for the first judicial district and county of Santa Fé. Harris, the plaintiff below, brought an action of trespass against the Denver & Rio Grande Ry. Co., a corporation under the laws of the state of Colorado, to recover damages in the sum of $10,000 for bodily injuries inflicted by the agents and employees of the defendant corporation, while in and about the employment of their principal, and recovered judgment in the sum of $9000. As to the merits of the case the whole controversy turns upon the question whether the injuries were inflicted by the agents or employees of the defendant corporation or other persons acting on their own behalf exclusively, or acting withing the scope of their employment by such corporation. A corporation being an artificial body created by law, all its acts necessarily must be performed by its agents and servants. And when a corporation is sued in an action founded on the unlawful or tortious acts of the agents or servants, the fact

whether the acts complained of were done on their own account exclusively or on behalf of the corporation within the line of their employment is not ordinarily to be established by the plaintiff by proof of what occurred in some meeting of the directors of the corporation,—the evidence of which is under the control of such directors,—but by proof of what the agents and servants of the corporation had done, and of the attending circumstances indicating the purpose of their acts and the object to be attained thereby; and especially if attained, and the corporation accepted the same and used the fruits thereof as its own, proof thereof might be received to establish the corporate liability.

The old common-law doctrine that "A corporation cannot be aiding to a trespass," nor "give a warrant to do a trespass without writing," or that "it could authorize no agent, do no act, and give no assent but by deed," was long since exploded. The doctrine as now understood and applied by the courts is that corporations are liable for every wrong, every trespass, and every tort committed by their agents and employees within the scope of their employment as such, and to the same extent as individuals under like circumstances; and the doctrine of ultra vires, as formerly understood and applied, does not under the modern decisions have any application to such cases. Mechanics' Bank *v.* State Bank, 10 Wall. 645; Nat. Bank *v.* Graham, 100 U. S. 702; State *v.* Morris & E. R. Co., 23 N. J. Law (3 Zab.), 368, 369.

The doctrine of ultra vires, as formerly understood and applied by the courts to corporations, was that such institutions were endowed with a species of infallibility; that they in their corporate character could not do or sanction any act by and through their agents or servants which they were not authorized to do by their respective charters conferring corporate powers; that because they were not authorized to do wrongful and tortious acts they could therefore do no wrong. But it was soon ascertained that these institutions notwithstanding they had no legal authority to do wrong, yet they often assumed powers ultra vires to do and actually did commit all sorts of trespasses and unlawful and wrongful acts through wholly irresponsible servants and employees, often caused the greatest losses and damages to private individuals and their property; and the courts, to protect society, were finally impelled ex necessitate to place the responsibility of corporations on a more enlightened and reasonable basis.

The doctrine of ultra vires, as now interpreted by the courts, and applied to corporations, signifies merely such acts and doings for any corporation which, though it may have the power to perform or to adopt and sanction through its agents or servants, yet it has no legal authority to do under its charter of corporate powers; in the same sense precisely that every act performed by a natural person which the law either in express terms or by necessary implica-

tion does not sanction, nor confer on him any right to do, would be illegal, and might be termed ultra vires.

In the well-considered case of State v. Morris & E. R. Co., supra, in which this whole subject is ably reviewed, and the modern doctrine clearly expressed, the court, by its chief justice, used the following language: "But it is said that although a corporation may omit to perform acts made obligatory upon it by law, and thus be liable for nonfeasance, yet from its very nature it cannot use force, and therefore cannot commit any act involving force, and which must be charged to have been committed vi et armis. This argument rests entirely upon the disability of the corporation to commit any act of trespass of positive wrong, and applies to its capacity to commit civil as well as criminal injuries. It is the very argument by which it was sought to be established that no action for a trespass or tort would lie against a corporation. But it has been well said, that if a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable civiliter for all torts committed by its servants or agents by authority of the corporation, expressed or implied. . . . The result of the modern cases is that a corporation is liable civiliter for torts committed by its servants or agents precisely as a natural person; and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal, nor a vote of the corporation constituting the agency or authorizing the act. . . .

"It is further objected that a corporation aggregate cannot be liable to indictment for a crime because the commission of the criminal act is not warranted by their corporate powers. This argument, pushed to its legitimate conclusion, would exempt a corporation from all liability for wrongs, civil as well as criminal. It is most aptly answered by Mr. Binney, in his argument in Chestnut Hill Turnpike Co. v. Britter, 4 Serg. & R. 16: 'According to the doctrine contended for, if they do an act within the scope of their corporate powers it is legal and they are not answerable for the consequences.' If the act be not within the range of their corporate powers they had no right by law to do it; it was not one of the objects for which they were incorporated, and therefore it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any court of justice. . . . It is said, again, that the individuals who concur in making the order or in doing the work are individually responsible. And so is every servant or agent by whose agency a tort is committed, but it has never been supposed that the principal is therefore exempt from liability. On the contrary, the principle and the policy of the law has ever been

to look to the principal rather than to the mere agent; and in the case of corporations it is the clear dictate of sound law not only, but of public policy, to look rather to the corporation at whose instance and for whose benefit the wrong is perpetrated than to the individual directors by whose order the wrong was done, who may be entirely unknown, or to the laborers by whom the work was performed, who, in a great majority of cases, would be alike unknown and irresponsible."

The authority of the agents and servants of the corporation, and the approval and acceptance of their work and its fruits by their principal, may be proved by the acts and conduct of the corporation in relation thereto, whether the same are manifested by it collectively or through its officers, agents, tenants, etc. Ang. & A. Corp. (9th ed.) § 186.

In Magill *v.* Kaufman, 4 Serg. & R. 318, the Supreme Court of Pennsylvania held that evidence of the acts and declarations of the trustees and agents of the corporation, both before and after the incorporation, while transacting business relative to the corporation, as well as evidence of what passed at the meeting of the congregation when assembled on business in relation thereto, were admissible to show the possession of the corporation of land and the extent of its claim of its boundaries.

We cite this authority in answer to the assumption of counsel for plaintiff in error, that the acts and declarations of the agents of the defendant corporation on the trial below ought not to have been received in evidence to establish its liability for the acts of its agents, and to show that it was implicated in taking possession of the railroad in question, and holding the same.

Under the modern, and as it would seem controlling, adjudications on the subject, there can be no doubt as to a legal proposition, that if the defendant corporation (plaintiff in error here) in any manner had formed the purpose of seizing, through its agents and employees, the Denver & Rio Grande Ry. while in the peaceable possession of the Atchison, Topeka & Santa Fé Ry. Co., and seizing the same by force, if necessary, and either directed, commanded, or counselled the same, or assented thereto, then it followed as a matter of law that the acts of its agents or employees, in taking possession in pursuance thereof, were the acts of the corporation. And if in taking such possession, under such circumstances, its agents or employees committed acts of violence amounting to trespasses or torts, for which an action would lie for damages, the corporation, as well as its agents and employees engaged in the same, would be liable to respond in damages to the injured parties; and as proper circumstantial evidence tending to prove the connection of the corporation with the acts of its agents in taking possession, such acts of its agents, as well as their declarations in respect thereto, and the object thereof, may be received. And if the cor-

poration accepted and received into its possession and assumed control of the railroad so seized, and commenced, and for a time continued, to use and operate the same as its own, it would be a very strong circumstance indeed tending to establish the fact that its agents and employees, in taking possession, were acting within the scope of their employment, and under the direction of their principal.

The record discloses the fact that there was evidence on the trial in the lower court to the effect that about the tenth or twelfth of June, 1879, the Atchison, Topeka & Santa Fé Ry. Co. were in peaceable possession, by its agents and employees, of a certain railroad in the state of Colorado, running from Alamosa to the city of Pueblo, in that state; that at or about that date, and while the Atchison, Topeka & Santa Fé Ry. Co. were so in possession of said railroad, the plaintiff in error, the Denver & Rio Grande Ry. Co., by an armed force of several hundred men, acting as its agents and employees, and under its vice-president and assistant general manager, attacked with deadly weapons the agents and employees of said Atchison, Topeka & Santa Fé Ry. Co., having charge of said railroad, and forcibly drove them from the same, and took forcible possession thereof; that there was a demonstration of armed men all along the line of the railroad seized, and while this was being done and the seizure was being made, the defendant in error, who was an employee of the Atchison, Topeka & Santa Fé Ry. Co., on said line of railroad, and while on the track of the road, and on a hand car thereon, in the line of his employment, was fired upon by men as he was passing, and seriously wounded and injured; that immediately upon the seizure of the railroad, as aforesaid, the plaintiff in error accepted it, and at once entered into possession thereof, and commenced, and for some time continued, to use and operate the same as its own.

But, notwithstanding this strong circumstantial evidence, it is contended on behalf of the plaintiff in error that inasmuch as there is no direct proof that the identical men who did the shooting had any specific orders or directions from the corporate authorities to act in the premises, we ought to assume that no such orders or directions existed, and that these particular men were acting entirely on their own behalf and independently of the corporation. This would be too much like an assumption that skirmishers in battle, because somewhat detached from the main body of troops, did not belong to the army, but were fighting independently on their own account, and without orders from the officer in command. All this might be possible, but the strong presumption would be the other way. The fact that these men committed the violent assault with deadly weapons at the time and place, and in the manner and under the circumstances, detailed in the evidence, gives rise to a very strong presumption that they were a part of the armed force

employed to seize the railroad. These facts and circumstances, together with the declarations of the agents and officials of the plaintiff in error, under whom this armed force acted and from whom they received their directions, were competent to go to the jury as evidence tending to establish the corporation's liability.

If the acts of trespass complained of were the acts of the agents, employees, or other persons on their own account, and were in no way authorized or sanctioned by the corporation, it was within the actual knowledge of some of its officers or agents, and could have been easily proved. No attempt of this kind having been made, the strong presumption arises that these armed men, including those who did the shooting, were acting in concert within the line of their employment by the corporation, for the attainment of a specific object on its behalf. The question as to which of these railway companies were legally entitled to the line of railroad in controversy between them does not arise in this case. Even if the Denver & Rio Grande Ry. Co. had been legally entitled to the possession, it would not have justified the manner of seizure. The excessive violence committed, in either event, would have constituted a trespass for which an action for damages would lie. We hold, therefore, that there was sufficient evidence submitted to the jury, which, if true,—and was for the jury to determine its credibility,—justified a verdict for the plaintiff.

A long list of specific instructions, founded mainly on the ancient doctrine that a corporation was incapacitated from doing or sanctioning any act of its servants not authorized by its charter or corporate authority, thus exempting it from all liability for the wrongful acts of its employees, though directed by its principal officers and managers, were asked to be given to the jury on behalf of plaintiff in error, and which were refused by the court, except two, one of which was given as demanded and the other given with a part erased; to the ruling of the court on each one of which, except the one given, the defendant below excepted. All the unconditional refusals to charge as demanded were proper, and constituted no error.

The instruction given by the court as demanded by the defendant corporation was as follows: "Agents or managers of the affairs of a railroad corporation such as the defendant cannot be legally employed by such company to shoot a person, nor are the officers, agents, or managers of such company, in the usual course of their employment as such officer, agent, or manager, authorized to employ any one to shoot another person." This instruction was given in full as demanded on behalf of the defendant corporation. There was no exception to this instruction on behalf of the plaintiff below, and we quote merely to show that it was more liberal to the defendant corporation than just. Whilst it was true as a legal proposition as far as it went, yet it was well calculated to mislead

the jury. Having been given as an independent instruction, the jury might have inferred from its phraseology that if the company could not legally authorize its agents to commit the trespass, it would not be liable. The instruction, to be proper, ought to have contained the qualifying words that notwithstanding the company could not legally authorize or sanction the wrongful act, yet if, as a matter of fact, it actually did not only authorize, but sanction the same, it would be liable.

The other instruction that was, as aforesaid, partly given and partly refused, is as follows: "Before a railroad company can be held liable for the wilful act of any employee or agent in shooting a person, or causing a person to be shot, it must appear from the evidence, to the satisfaction of the jury, that such employee or agent had been employed by the company under authority of its board of directors to do such acts, or that it in some way ratified the said act. ~~Failing in such proofs in this case the jury should find for the defendant.~~"

The latter clause of this instruction was erased evidently by the trial judge, and marked in the margin by him so that it stands upon the record thus: "Failing such proof in this case the jury should find for the defendant. Given except as to part lined out."

This instruction was excepted to on behalf of the plaintiff in error on the ground that the entire instruction was not given. But the part that was given was open to the criticism of being liable to improperly mislead the jury, since they might have inferred therefrom that to render the corporation liable for the trespass committed by its agents or employees, it must have been directed or sanctioned at some meeting of the board of directors, which, as we have seen from the authorities, does not follow as a necessary prerequisite to establish such liability, since the same may be implied or inferred from the acts of officials and agents of the corporation, and the attendant circumstances, without any formal meeting of the board of directors to consider the matter. The plaintiff in error cannot be injured or prejudiced by this instruction, as it is more in his favor than the law would seem to justify. But the erasure in this instruction is an irregularity under our statute, which provides as follows: "If the court refuse a written instruction as demanded, but gives the same with a modification, which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined, and shall follow some such characterizing words as 'changed thus,' which words shall themselves indicate that the same was refused as demanded." Prince's St., p. 127, § 24.

The erasure in this instruction by the judge was clearly a violation of the statute. But as the statute on the subject may properly be considered as directory merely, and not mandatory, and as the

erasure cannot be considered as prejudicial to the plaintiff in error, it is not such an irregularity as will justify a reversal.

No substantial error appearing from an examination of the record, it is ordered that the judgment below be affirmed.

Injuries to Passengers by Servants.—We do not propose in this place to consider the subject of the liability of a railroad company for injuries occasioned to passengers by the voluntary acts of servants of railroad companies. This subject we have already treated upon other occasions. The modern decisions are all based upon the special duty owing by the company to its passengers, thus removing the cases from the plane of ordinary decisions upon the liability of a master for the act of the servant. Of this latter class is the principal case reported above.

General Principles.—A railroad company is liable for any injury inflicted by the act of its servant while in the course of his employment, even though he may have acted recklessly, violently and without regard to the ordinary dictates of prudence. Phila. & Reading R. R. Co. *v.* Derby, 14 How. (U.S.) 468; Toledo, W. & W. R. Co. *v.* Harmon, 47 Ill. 298; Donaldson *v.* Miss. & Mo. R. R. Co., 18 Iowa, 280; Louisville & N R. Co. *v.* Collins, 2 Duv. (Ky.) 114; Kline *v.* Central Pac. R. Co., 37 Cal. 400; Pittsburgh, A & M. Pass. R. Co. *v.* Donahue, 70 Pa. St. 119; Shea *v.* Sixth Avenue R. R. Co., 62 N. Y. 180; Penna. Co. *v.* Toomey, 1 Am. & Eng. R. R. Cas. 461; Chicago, B. & Q. R. Co. *v.* Sykes, 2 Am. & Eng. R. R. Cas. 254; Hoffmann *v.* N. Y. C. & H. R. R. Co., 4 Am. & Eng. R. R. Cas. 537; Chicago City R. Co. *v.* McMahon, 8 Am. & Eng. R. R. Cas. 68; Johnson *v.* Chicago, etc., R. Co., 8 Am. & Eng. R. R. Cas. 206; Carter *v.* Louisville, etc., R. R. Co., 8 Am. & Eng. R. R. Cas. 347; Ellet *v.* St. Louis, etc., R. Co., 12 Am. & Eng. R. R. Cas. 183.

On the other hand if the acts complained of be outside the scope of the servant's duty and prompted by malice or occurring through wantonness, the company cannot be held liable. Snyder *v.* Hannibal & St. J. R. Co., 60 Mo. 413; DeCamp *v.* Miss. & Mo. R. R. Co.,12 Iowa, 348; Cooke *v.* Illinois Central R. R. Co., 30 Iowa, 202; Porter *v.* Chicago, R. I. & P. R. Co., 41 Iowa, 358; Hudson *v.* M. K. & T. R. Co, 16 Kans. 470; New Orleans, J. & Gt. N. R. Co. *v.* Harrison,48 Miss. 112; Little Miami R. R. Co. *v.* Wetmore, 19 Ohio St. 110; McKeon *v.* Citizens' Ry. Co., 42 Mo. 79; Penna. Co. *v.* Toomey, 1 Am. & Eng. R. R. Cas. 461; Marion *v.* Chicago, etc., R. Co., 8 Am. & Eng. R. R. Cas. 177; Galveston, etc., R. R. Co. *v.* Donahue, 9 Am. & Eng. R. R Cas. 287; C., St. L. & N. O. R. R. Co. *v.* Janett, 11 Am. & Eng. R. R. Cas. 455; Marrier *v.* St. Paul, M. & M. R. Co., supra; Gilliam *v.* South & North Ala. R. Co., and note, supra.

Particular Instances.—For the convenience of our readers we subjoin some of the leading cases upon the topic under discussion under appropriate heads.

Assaults.—As to when assaults by servants or individuals are deemed so far out of the line of the servant's duty as to exempt the company from liability, see Hudson *v.* M. K. & T. R. Co., 16 Kans. 470; Porter *v.* Chicago, R. I. & P. R. Co., 41 Iowa, 358; New Orleans, Jackson & Gt. N. R. Co. *v.* Harrison, 48 Miss. 112; McKeon *v.* Citizens' Ry. Co., 42 Mo. 79; Little Miami R. Co. *v.* Wetmore, 19 Ohio St. 110; Gilliam *v.* South & North Ala. R. Co., and note, supra.

The following are cases in which the assaults were held within the line of the servant's duty, and the company was held liable accordingly. Shea *v.* Sixth Avenue R. R. Co., 62 N. Y. 180; Pittsburgh, A. & M. Pass. Ry. Co. *v.* Donahue, 79 Pa. St. 119.

Running Trains.—The engineer's wilful act in purposely running over a person or cattle on the track is not imputable to the company. DeCamp *v.*

Miss. & Mo. R. R. Co., 12 Iowa, 348; Cooke v. Illinois Central R. R. Co., 30 Iowa, 202.

Ordinarily, however, the railroad company is liable for the gross negligence or carelessness or wanton behavior of the engineer in running a train. Toledo, W. & W. R. Co. v. Harmon, 47 Ill. 398; Donaldson v. Miss. & Mo. R. R. Co., 18 Iowa, 280; Louisville & N. R. Co. v. Collins, 2 Duv. (Ky.) 114; Phila. & Reading R. R. Co. v. Derby, 14 How. (U. S.) 468.

Practice.—Where the particular act complained of as producing the injury is not specially ordered by the master, but is simply performed by the servant in the general scope of his employment, the proper form of action is trespass on the case, not trespass vi et armis. Phila. G. & N. R. Co. v. Wilt, 4 Whart. 143; Illinois Central R. R. Co. v. Reedy, 17 Ill. 580; A. V. R. Co. v. McLean, 1 Am. & Eng. R. R. Cas. 464.

Day
v.
Highland Street Ry. Co.

(135 *Massachusetts Reports*, 113.)

A street railway car, which is run on Sunday for the purpose of accommodating the public generally and earning money from any one who may see fit to travel upon it, is run in violation of the Gen. Sts. of Massachusetts, c. 84, §§ 1, 2, although some of the passengers are lawfully travelling.

A conductor of a street railway car, who is performing the ordinary duties of his employment on Sunday, is both laboring and travelling in violation of the Gen. Sts., c. 84, 1, 2; and if, while standing on the step on the side of an open car, he is injured by being struck by a car of another corporation passing on a parallel track, his illegal acts necessarily contribute to cause his injury, and preclude his maintaining an action therefor, notwithstanding the St. of 1877, c. 232.

Tort for personal injuries occasioned, on Sunday, June 20, 1880, to the plaintiff, a conductor in the employ of the Metropolitan R. R. Co., while standing on the step on the side of an open street car, and leaning into the car for the purpose of collecting fares, by being struck by a car of the defendant corporation passing on a parallel track. At the trial in the Superior Court, the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

The case was argued in March, 1882, by G. F. Verry (J. Hewins with him) for the defendant, and by S. B. Allen (W. B. Allen with him) for the plaintiff; and was afterwards submitted on briefs by the same counsel.

Colburn, J.—The question whether the car, upon which the plaintiff was conductor, was being run in violation of the Gen. Sts. c. 84, §§ 1, 2, at the time of the accident, or whether there was evidence in the case which would warrant the jury in finding that the car was not being run in violation of the statute, lies at the

foundation of the case. For if the car was run lawfully, for the purpose of carrying passengers, the plaintiff was violating no law in performing the usual duties of conductor of the car, and his rights and obligations were substantially, if not entirely, the same, though it was the Lord's day, as they would have been on any other day.

We are of opinion that the whole evidence in the case shows that this car was being run for substantially the same purposes, and from the same motives, that street cars are usually run on secular days, for the purpose of accommodating the public generally, and earning money from any one who might see fit to travel upon it. And we are of opinion that a car so run is run in violation of law, though some of its passengers may be lawfully travelling.

It is not within our province to determine the wisdom or expediency of the law, or how far there has been a change in public sentiment in relation to the proper manner of observing the Lord's day. These considerations are for the Legislature. We can only take the law as it is written, and apply it according to its obvious meaning and the intention of the Legislature.

We do not intend to decide that a street car may not be so run on Sunday as to come within the exception of the statute, and be employed in a work of necessity or charity. We only decide that in this case there was no evidence which would warrant a jury in finding that this car was run from considerations of necessity or charity, and that the jury should have been so instructed. We cannot hold that the mere fact that some of the passengers on the car were lawfully travelling rendered the running of the car lawful. Commonwealth *v.* Sampson, 97 Mass. 407; Commonwealth *v.* Josselyn, 97 Mass. 411.

The plaintiff was engaged in performing his ordinary duties as conductor of a street car, and in performing those duties he was doing labor or work. Though he was travelling, he was primarily laboring, and his travelling was merely an incident of the kind of work in which he was engaged. The car being run in violation of law, he was both laboring and travelling on the Lord's day in violation of law. The question then arises whether his violation of law contributed to cause his injury.

The general principles applicable to the case are well settled in this Commonwealth. The question has more frequently arisen in cases of travelling, doubtless for the reason that travelling is the more common form in which the statutes for the observance of the Lord's day are violated, or for the reason that in travelling a person is more exposed to injury than in laboring.

It has been uniformly held in numerous decisions, from Bosworth *v.* Swansey, 10 Met. 363, to Davis *v.* Somerville, 128 Mass. 594, that a person travelling on the Lord's day, in violation of law, cannot recover in an action against a city or town for injuries sustained

from a defect in a highway. This is not because the liability of a city or town for a defect in a way is imposed by statute, or because a city or town stands in any different position from an individual, or other corporation, but only because the act of travelling, which is the act prohibited, necessarily contributes to cause the injury. The act of travelling in violation of law on the Lord's day, with no evidence of any other negligence, has been held to be necessarily contributory to the injury sustained by the plaintiff. Stanton *v.* Metropolitan R. R., 14 Allen, 485; Smith *v.* Boston & Maine R. R., 150 Mass. 490; Lyons *v.* Desotelle, 124 Mass. 387; Bucher *v.* Fitchburg R. R., 131 Mass. 156; s.c., 6 Am. & Eng. R. R. Cas. 213.

In McGrath *v.* Merwin, 112 Mass. 467, which was an action brought to recover for injuries sustained by the plaintiff, while engaged in clearing out a wheel-pit unlawfully on the Lord's day, from the negligence of the defendant in carelessly starting the wheel, it was held that the illegal act of the plaintiff was inseparably connected with the cause of action, and contributed to his injury, and that he could not recover.

In all cases of travelling or laboring on the Lord's day, in violation of law, all the acts of travelling or laboring being illegal, if any act of so travelling or laboring by a plaintiff contributes to his injury, it is held, under our decisions, that his illegal act must necessarily be a contributory cause of his injury, and prevent his recovery.

The plaintiff contends that, by the provisions of the St. of 1877, c. 232, his illegal travelling (the defendant being a common carrier of passengers) constitutes no defence to his action. We have not found it necessary to determine whether the words "a person so travelling," in the St. of 1877, mean a person travelling in any way, or whether they are confined to a person travelling as a passenger with a common carrier of passengers, as in our view it was rather as a laborer than as a traveller that the plaintiff was injured.

We cannot doubt that the acts of the plaintiff in laboring necessarily contributed to his injury. The place he was occupying on the car, and the attitude he assumed at the time in collecting fares, especially exposed him to the injury he received, and contributed to it. The case of McGrath *v.* Merwin, ubi supra, is decisive of this case.

A majority of the court are of opinion that, under the undisputed facts in the case, the jury should have been instructed that the plaintiff's illegal acts contributed to his injury, and that he was not entitled to recover. Smith *v.* Boston & Maine R. R., ubi supra.

Exceptions sustained.

Sunday Laws.—Ordinarily in an action against a common carrier for personal injuries, it is no defence that the accident occured on Sunday either

while the plaintiff is travelling or employed upon his ordinary occupation. Philadelphia R. R. *v.* Towboat Co., 23 How. 217; Carroll *v.* Staten Island Co., 58 N. Y. 126; McArthur *v.* Green Bay Co., 34 Wisc. 139; Sawyer *v.* Oakman, 7 Blatch. C. Ct. 290; Mohney *v.* Cook, 26 Pa. St. 342; Schmid *v.* Humphrey, 48 Iowa, 652

In Massachusetts the law is to a contrary effect. Stanton *v.* Metropolitan R. R. 14 Allen 485; Feital *v.* Railroad Co., 109 Mass. 398; Smith *v.* Boston R. R. Co., 120 Mass. 490; Lyons *v.* Desotelle, 124 Mass. 387; Buchner *v.* Fitchburg R. Co., 6 Am. & Eng. R. R. Cas. 212.

As to the applicability of Sunday laws to work on railroads in general, see Yonoski *v.* State, 5 Am. & Eng R. R. Cas., 40; Phila. W. & B. R. Co. *v.* Lehman, 6 Am. & Eng. R. R. Cas. 194; Commonwealth *v* Louisville, etc., R. Co., 6 Am. & Eng. R. R. Cas. 216; Augusta R. R. *v.* Renz, 55 Ga. 126; State *v.* Balt. & Ohio R. R. Co., 15 West Va. 362; Gulf C. & S. F. R. Co., *v.* Levy, 12 Am. 7 Eng. R. R. Cas. 96.

Burlington, Cedar Rapids and Northern Ry. Co.

v.

Dowell, Administrator.

(*Advance Case, Iowa. December* 15, 1883.)

The brakeman of a railroad train who was riding on the engine with the conductor was ordered by the latter to look back and see if the train was broken. He stepped to the side of the engine, fell out and was killed. No one saw him fall or knew how the accident happened. There were high banks of snow on either side of the track, in the condition in which they had been left by the snow-plough. The evidence was contradictory as to how near these banks were to the engine. At the place where the accident occurred there was no indication that decedent had been struck by the bank but only that he had fallen against it. In an action by the administrator of the deceased against the company to recover damages for his death,

Held, that there was no evidence of negligence on the part of the railroad company to sustain a verdict for the plaintiff.

A railroad company is not chargeable with negligence to its employees in letting a snow bank stand on either side of the track in the manner in which it has been left by the snow-plough.

In an action by the administrator of a decedent to recover damages for causing his death, a payment to the widow of the decedent (not his administratrix) cannot be pleaded in satisfaction.

Action to recover damages to the estate of which plaintiff is the administrator, resulting from the death of the intestate caused by personal injuries received by him through the alleged negligence of defendant while he was in its employment, as a brakeman.. There was a judgment upon a verdict for plaintiff; defendant appeals.

J. & S. K. Tracy for appellant.

Traer & Voris for appellee.

BECK, J.—The plaintiff's intestate while in the discharge of his duty as a brakeman upon a train running upon defendant's road. fell from the engine, where he, with the conductor, was at the time, and was run over and killed by the train. He was directed by the conductor to look back to discover whether the train was separated, and in obedience to this command, went to the side of the engine. He was last seen in life then. No one observed his fall, and the cause of it is not shown by the evidence. At the time the train was passing through a snow bank about ten feet high. The track had been cleaned off, and the snow deposited by the snow-plough on the bank four or five days before the accident. The snow bank at the bottom was far enough away to permit the cars to pass; and it receded at an angle of about forty-five degrees, according to the testimony of some witnesses. Others testified that the bank at some points approached to within fifteen inches of the car. The intestate assisted to clear off the track and had knowledge of character of the snow bank and the distance it was from the car.

Plaintiff insists that the intestate in looking back as directed by the conductor, was struck by the snow bank, which caused his fall, and that defendant was negligent in permitting the bank to remain too near the track. But there is no positive evidence supporting the fact upon which this theory is based, and the jury so find in response to a question propounded to them. The appearance of the snow at the place where the intestate fell, did not indicate that he was struck by the bank. It did show that he fell against the bank.

The court directed the jury in effect that if from the evidence they could not find whether the accident was the result of defendant's negligence or want of ordinary care by the intestate, and "the matter is thus left to conjecture," their verdict should be for defendant. And that if they found the snow bank was so near the cars that the intestate could not have obeyed the order to look back without being struck, while exercising ordinary care and in ignorance of the fact that there was a snow bank at the place, they should find for plaintiff.

The defendant's counsel asked instructions to the effect that the defendant was not to be regarded as negligent on account of the proximity of the snow bank to the track, and the deceased assumed in entering the employment the risk of the dangers resulting therefrom. These instructions were refused. We are of the opinion that defendant ought not to be charged with negligence on account of the proximity of the snow bank to the track. The accumulation of snow upon the railroad track must be removed in order to make the operation of the trains possible. This was done in this instance by a snow-plough, a common instrument used for the purpose of removing snow from the track. The defendant was not negligent in using it. These conditions and incidents connected with snow

are known to the employees of railroads and was well known to the intestate for he assisted in clearing the track. The bank where the accident occurred was in the condition in which it was left by the snow-plough. The dangers from the snow bank were such as are inseparable from the operation of the road when snow prevails, and is removed from the track and the risk of them was assumed by the intestate. Railroad employees assume the risk of all dangers necessarily attendant upon the operation of the roads. The dangers from snow and its removal from the track in the usual manner always attend the operation of railroads when snows prevail, and are contemplated by railroad employés when they accept employment in the operation of trains in winter, and the railroad companies are not liable for accidents resulting therefrom. These doctrines should have been expressed in an instruction to the jury.

We are of the opinion that the verdict is without the support of evidence. There is no evidence tending to prove that defendant was negligent. In leaving the snow bank stand so near the track it is not chargeable with negligence, and it is not attempted to establish negligence upon any other ground. And there is no evidence that the intestate was struck by the snow bank causing him to fall. The only evidence upon this point of the case tended to prove that he was not struck by the bank.

Defendant pleaded satisfaction of the damages claimed in this case by payment to the widow of intestate. She is not and was not the administrator, and could not release the claim of the estate of the intestate based upon his death through negligence of defendant. She could release the claim for damages she individually sustained, and the satisfaction pleaded by defendant could extend no farther.

For the errors pointed out the judgment of the District Court is reversed.

Ice and Snow.—A company is not bound to keep the ground near its tracks free from ice and snow and the danger incident to such a condition of the ground is an ordinary risk of a brakeman's empoyment. Piquegno *v.* Chicago & G. T. R. Co., 12 Am. & Eng. R. R. Cas. 210.

Settlement of Claim for Damages.—Where the railroad company settles with the decedent during his lifetime for the injury he has sustained, this will preclude an action by his administrator to recover damages for his death. Bead *v.* Great Eastern R. Co., L. R. 3 Q. B. 555; Dibble *v.* New York, etc., R. R. Co., 25 Barb. (N. Y.) 183.

See generally, Stout *v.* Indianapolis, etc., R. R. Co., 41 Ind. 149; Barnett *v.* Lucas, L. R. 6 C. P. 247; McGovern *v.* New York, etc., R. R. Co., 67 N. Y. 417; Hansford's Admx. *v.* Payne, 11 Bush, 380; Conner's Administratrix *v.* Paul, 12 Bush, 140. Cf. Corcoran *v.* Boston & Albany R. R. Co., 12 Am. & Eng. R. R. Cas. 226.

MARTIN
v.
NORTH STAR IRON WORKS.

(*Advance Case, Minnesota. January* 14, 1884.)

Defendant negligently piled a quantity of smoke-stacks and other material near the track of the Minneapolis Eastern Ry. Co. A train of cars coming along, one of the cars caught one of the stacks, pushed it against a tower in which the plaintiff was stationed in his employment of signaling trains, and he was injured. *Held*, that whether so piling the smoke-stacks, etc., was an act of negligence as to plaintiff, was, under the circumstances, a question for the jury; that, so far as defendant is concerned, negligence in law is not to be attributed to either the railroad company or to the plaintiff merely because knowing of the danger to passing trains from the fire of smoke-stacks, etc., the former continued to run its trains, and the latter continued in his employment of signaling trains.

APPEAL from an order of the district court, Hennepin county.
Merrick & Merrick, for respondent.
F. Hooker and F. B. Hart, for appellant.

GILFILLAN, C. J.—The defendant caused to be piled a large number of smoke-stacks, boilers, and other material along-side of and very near the track used by the Minneapolis Eastern Ry. Co., on or along River street, in the city of Minneapolis. The plaintiff was employed in signaling railroad trains, and for that purpose was stationed in a tower standing on posts beside the track, and about 100 feet distant from the pile of smoke-stacks, boilers, etc. A train of cars coming along, one of them, by reason of the proximity to the track of said pile of smoke-stacks, etc., caught and became attached to and pushed along the surface of the ground one of the smoke-stacks against the stairway leading up into the tower, careening the tower in such manner as apparently to endanger the life of plaintiff, then employed in it, signaling trains, and he, to escape, leaped from the tower to the ground, and thereby was injured. To recover for such injury this action is brought. The trial below resulted in a verdict for the plaintiff. The jury found, of course, that it was negligence in defendant to pile the smoke-stacks, boilers, etc., in the manner in which they were piled, so near the track, and we do not understand that any exception is taken here to that finding. The questions made here are: Was there negligence as to the plaintiff? If so, was it the proximate cause of the injury? Was there contributory negligence on the part of plaintiff? The first of these was, under the circumstances, certainly a question for the jury. If piling the material near the track was a negligent act, it was negligence not only as to the rail-

road company, whose property and trains might be endangered thereby, but also as to all persons who might probably be put in danger from its probable consequences. If the material was so piled as to create a danger, such as an ordinarily prudent person might foresee, that the material would be caught and pushed along in a dangerous manner, so piling it was an act of negligence as to all who might usually be within the reach of the consequences that might be apprehended. It is none the less so because the railroad company was more likely than they to suffer from it. It was for the jury to say whether an ordinarily prudent person would have foreseen that so piling the material made liable to happen the very things that did happen, to wit, that a passing train should catch and push or carry the material against the tower so as to endanger any one stationed in it. That defendant's negligence was not the proximate cause of the injury is claimed from the rule that where an independent, efficient, wrongful cause intervenes between the original wrongful act and the injury ultimately suffered, the former and not the latter is deemed the proximate cause of the injury. It is claimed that negligence of the railroad company intervened between that of defendant and the injury to plaintiff, and that but for such negligence the injury would not have happened.

The imputation of negligence to the railroad company is made on the same propositions of fact and the same line of reasoning as those on which negligence is attributed to plaintiff, and the two may be considered together. The fact that the smoke-stacks, boilers, etc., were piled near the track, and the manner in which they were so piled, appears to have been known for some weeks, both to the railroad company and to the plaintiff, and it is urged that if the presence of the piles made it dangerous to run the trains, as the company had the same knowledge of it that defendant had, it was negligence in law on the part of the company to continue running them; and if the presence of the piles and the running of the trains endangered one employed in the tower, as the plaintiff had the same knowledge of it that defendant had, it was negligence in law on his part to continue there employed. To put the argument in the shape of a general proposition it amounts to this: If one by negligence makes it permanently dangerous to another to continue in a lawful employment, or in the lawful use and occupation of his property, the law will attribute to the latter, if he so continue, the consequences of the negligence of the former, so as to prevent recovery in case of injury from the negligence. The proposition needs no answer. It is true that, when the catastrophe comes, the law will not excuse one for unnecessarily putting himself in the way of it, nor for heedlessly neglecting present apparent means to divert it; but, as said by the court in Schell *v.* Second Nat. Bank, 14 Minn. 43 (Gil. 34), "it is undoubtedly true

that a man cannot be driven from the use of his own property by the acts or negligence of his neighbor. He may use and occupy his own property, and, although it may be in an exposed condition, that does not absolve his neighbor from the exercise of proper care."

There was no negligence in law on the part of plaintiff or the railroad company that can be alleged by this defendant.

Order affirmed.

Mitchell, J., concurring. In view of the undisputed fact that the railroad knew that their smoke-stacks were in dangerous proximity to its track, I think it was guilty of negligence in running its trains without first having these obstructions removed. But still, the negligence of defendant in placing these obstructions so near the track was the proximate cause of plaintiff's injury, although it would not have occurred but for the succeeding negligence of the railroad company. It was simply a case of the concurrent or successive negligence of two persons, combined together, resulting in an injury to a third person, for which he may recover damages from the one guilty of the first wrong, notwithstanding the suceeeding negligence of the other united in producing the injury. Burrows *v.* Gas Co., L. R. 5 Exch. 67; Illidge *v.* Goodwin, 5 Car. & P. 190; Byrne *v.* Wilson, 15 Ir. R. C. L. 332; Pastine *v.* Adams, 49 Cal. 87; Ricker *v.* Freeman, 50 N. H. 420. On this ground I concur in the decision of the case.

Union Pacific Ry. Co.
v.
Fray.

(*Advance Case, Kansas. April* 2, 1884.)

Where a servant of a railroad company employed in operating a derrick is charged with others with the duty of keeping a rope about the derrick wet, and his duty is not attended to in consequence of which the rope breaks, injuring the plaintiff, he cannot recover damages from the railroad company.

Instructions which, though correct as abstract propositions of law, are inapplicable to the case in hand and tend to mislead the jury constitute ground for reversal.

Where a jury renders a general verdict and makes special findings by answering special questions submitted to them, and some of the special findings are not true, and some of the answers given to the special questions are so evasive and unsatisfactory as to lead to the belief that the party against whom the jury rendered its verdict did not have a fair and impartial trial, the verdict and findings should be set aside and a new trial granted.

Error from Wyandotte county.

J. P. Usher and Charles Monroe for plaintiff in error.

I. B. Sharp and R. P. Clark for defendant in error.

VALENTINE, J.—This was an action brought by William Fray against the Union Pacific Ry. Co. for the recovery of damages for the alleged negligence of the defendant in failing to provide and maintain a safe and sufficient derrick, with sufficient ropes and appliances for the safe handling of stone, in building a culvert, whereby the plaintiff was injured. The case was tried before the court and a jury, and judgment was rendered in favor of the plaintiff, and against the defendant, for $2000 damages, and costs of suit. The defendant now appeals to this court.

It appears that on November 17, 1882, the plaintiff was in the employment of the defendant, aiding and assisting in building a culvert for the defendant on its line of railroad, in Wyandotte county, Kansas, at a point known as "Deep-hollow Bridge," near a station on the line of the road called "Tiblow." The employment of the plaintiff was in the management and operation of a derrick, provided by the defendant for moving heavy stones from freight cars to the places required for the construction of the culvert. While the plaintiff was assisting in the management of said derrick, in moving a large stone, a rope attached to a pulley connected with the derrick broke, whereby the cog-wheels, pulleys, and other parts of the derrick were broken, and portions thereof were thrown against the plaintiff, striking him on his head and face and elsewhere, whereby injuries were inflicted upon him from which he suffered great loss and pain. It is admitted that all that happened was the result of the breaking of the rope, and that the rope was broken because of negligence on the part of some person in not keeping it properly wet with water, so as to prevent its burning from friction. The only question between the parties is, who was the negligent party in not keeping the rope properly wet? Was it the plaintiff, either alone or in conjunction with the other employees of the defendant, or was it the other employees alone? The plaintiff claims that it was no part of his duty to attend to the rope or to keep it wet, and that the negligence in not keeping it wet was solely the negligence of the other employees; while the defendant claims that it was the duty of the plaintiff, along with one or two others of its employees, to jointly and severally keep a careful watch of the rope, and to keep it thoroughly wet, so that it would not burn or break from friction. The evidence with respect to whose duty it was to watch the rope, and to keep it wet at the exact time when the accident occurred, is to some extent unsatisfactory and conflicting; and from this unsatisfactory condition of the evidence it is at least doubtful whether exact justice was done by the verdict and judgment rendered in the case.

Many of the instructions of the court to the jury are hardly applicable to the facts of this case, and many of the special findings of the jury are unfair, evasive, and unsatisfactory. It may be that the general verdict of the jury is right, but the manner in which

the jury answered many of the special questions submitted to them is certainly sufficient to raise great doubts as to the correctness even of their general verdict.

At the present we shall pass over the instructions of the court and shall first consider the special findings of the jury, remarking, however, that we think it is probable that some of the irrelevant instructions are so misleading under the facts of this case that the judgment ought to be reversed upon the instructions alone. We would also state, before giving the special findings of the jury, that Samuel Mallison was the general superintendent of the work in building the culvert; that William Ulrich was the overseer or foreman of the work, under Mallison; and that John Nelson and the plaintiff were laborers handling the derrick, and that they were the only persons present upon the platform and near the derrick when the accident occurred.

The special findings, with our comments thereon, are as follows:

"(1) Did Mallison, for the defendant, have the control and direction of the work, the way and manner of its performance, including the derrick and its apparatus, where the plaintiff was injured? *Answer.* Yes, when present; when absent that duty was delegated to the foreman, Ulrich."

This finding, we think, is correct.

"(2) Was the plaintiff instructed by Mallison, acting under the defendant, that there was danger of the brake-rope burning in letting the rock down into place if the rope was not kept wet? *A.* Any instruction then given was not given particularly to the plaintiff, but generally to all concerned."

Mallison did give special instructions to the plaintiff, and also general instructions to all concerned.

"(3) Did not Samuel Mallison, at or about the commencement of the work for the defendant, direct the plaintiff to get a bucket of water with a cup or can, to be used in wetting the brake-rope? *A.* He ordered plaintiff to bring up a bucket of water and a cup, and then he, Mallison, poured the water on himself."

This finding is literally true, but Mallison poured the water on the brake-rope himself principally for the purpose of showing the plaintiff and the other employees how it should be done.

"(4) Did not Samuel Mallison direct the plaintiff to keep a bucket well supplied with water at all times, to wet the brake-rope while lowering rock, and to see to it himself that the rope where it wound around the shaft should be kept wet while rock was being lowered? *A.* The preponderance of evidence shows that he did not so direct him."

This finding, we think, is literally untrue. The question should have been answered by a simple affirmative.

"(5) If the brake-rope had been kept wet where it was wound around the shaft and the friction occurred would it have burned

and broken? *A.* It would not have burnt, but might have broken."

The answer that the rope might have broken is mere conjecture, for the fact is that the rope burned, and it probably would not have broken if it had not burned.

"(6) Did the plaintiff observe and obey the directions of Samuel Mallison in respect to keeping the rope wet? *A.* The plaintiff obeyed all orders that he received in reference to the water until such directions were annulled by other directions from the foreman, Ulrich."

The answer in effect that Ulrich annulled the directions of Mallison is not responsive to the question, nor is it true. Ulrich gave to the plaintiff another duty to perform—that of giving signals; but, from the preponderance of the evidence, the plaintiff might have attended to both duties—that of giving signals and also that of keeping the rope wet. Upon this subject, however, the evidence is conflicting.

"(7) Was not the plaintiff repeatedly warned by Samuel Mallison and Wm. Ulrich, the foreman upon the works, to be careful to attend and see that the brake-rope was kept wet while rock was being lowered by the derrick to work below? *A.* The warnings of Mallison and Ulrich were not particularly to the plaintiff, but general to all concerned."

Some of the warnings were given particularly to the plaintiff, and others were given generally to all concerned.

"(8) Were not the accident to the plaintiff and the injury sustained by him caused by the burning of the brake-rope while lowering the rock? *A.* They were caused by the burning and wear of the rope."

This finding, we think, is correct.

"(9) Would the brake-rope have burned if it had been kept wet as directed by Mallison? *A.* It would not have burnt."

This finding we also think is correct.

"(10) Did any one for the defendant, at any time, relieve the plaintiff from observing the directions given him by Mallison, in respect to keeping the rope wet? If so, name the person, and state what was said. *A.* The evidence shows that the directions of Mallison in reference to the water were not special to plaintiff. Plaintiff was relieved of any duty devolving on him in consequence of such directions when Owens was sent up to pour water on the shaft, and the plaintiff assigned the duty of giving signals by Ulrich."

This finding is evasive and untrue. Some of the directions of Mallison were special to the plaintiff, and some of them were general to all concerned. And while Owens, at one or more times, was directed to pour water on the rope, and while the plaintiff was directed to give signals, yet the plaintiff was at no time relieved from pouring water on the rope, if he could conveniently do so

and it was necessary that the same should be done. At the time this accident occurred Owens was not at the derrick or near there, but was down under the bridge mixing mortar, and at that time had nothing to do with the derrick or with wetting the rope.

"(11) Was not the plaintiff provided with a bucket for the water which he was to use in wetting the brake-rope, and a proper vessel for applying the water to the rope, and was not water flowing near by which the plaintiff could get to wet the rope? *A.* A bucket, can, and water were there, but it was not the plaintiff's duty to use them."

The plaintiff was at one time provided with a bucket, etc., for water, and it was at one time his duty to use them. Whether it was his duty to use them at the particular time when the accident occurred is the doubtful question. If he was not relieved from such duty by having the additional duty imposed upon him of giving signals, then it was still his duty to use the water in wetting the rope at the time the accident occurred.

"(12) Was not the brake-rope new and ample for the purpose of controlling the lowering of the rock by the derrick, and was not the only thing needed to make it absolutely safe the keeping it wet as directed by Mallison? *A.* It was not. Ulrich was informed before the accident that the brake-rope was in a very defective condition."

Upon this subject the evidence was conflicting; but the finding, or at least the first part of the answer, is probably against the weight of the evidence.

"(13) Had not the defendant a large quantity of new rope at his work, from which brake-ropes were to be taken as often as the brake-rope should become worn so as to be unsafe? *A.* Yes."

This finding is literally true.

The foregoing are all the special findings in the case.

We shall now give some of the instructions of the court to the jury, with our comments thereon. They are as follows:

"(5) . . . The jury are instructed that in determining the question of negligence, as in this case, they should take into consideration the situation and conduct of both parties at the time of the alleged injury, as disclosed by the evidence; and if the jury believe from the evidence that the injury complained of was caused by the defendant's agents, superintendents, overseers, and servants, as charged in the petition, and without any greater want of care and skill on the part of the plaintiff than was reasonably to be expected from a person of ordinary prudence and care in the situation in which he found himself as placed, then the plaintiff is entitled to recover."

Now, the defendant has at all times admitted that "the injury complained of was caused by the defendant's agents . . . and servants, as charged in the petition." It has at all times admitted

that the injury complained of was caused by the negligence of the plaintiff and Nelson in not keeping the rope wet, and claims that they were its agents and servants for the particular purpose, among others, of keeping the rope wet.

"(7) The jury are instructed that a master employing servants upon any work—particularly a dangerous work—must use due and reasonable diligence that he does not induce them to work under the notion that they are working with proper and safe machinery while employing defective and dangerous machinery; and if an employee it so injured on that account, and without any fault of his own, the master is liable in damages."

There was no question in this case with regard to the dangerous character of the work. All parties knew that it was comparatively safe if the rope was kept wet, but that it was very dangerous if the rope was not kept wet; and the defendant did not "induce" the plaintiff and his associates "to work under the notion that they were working with proper and safe machinery while employing defective and dangerous machinery." All parties knew the condition of the machinery and in what the danger consisted.

"(9) Where business is carried on by machinery, as is used in operating a derrick, as appears in the testimony, in this case, it is the duty of the employer, whether corporate or not, to keep the machinery in such condition as from the nature of the business and employment the servant or employee has a right to expect it will be kept, and when the employer fails to do so, through the exercise of ordinary care, he or it is liable for the injuries arising from its neglect."

This, as an abstract proposition, is correct; but, as applied to the facts of this case, is misleading and erroneous. Of course, the plaintiff has a right to expect that the railroad company, or its servants or agents, would keep the rope in safe condition; but if he and Nelson were the special servants and agents of the railroad company for that purpose he can hardly expect to recover for injuries resulting from his own negligence in not keeping the rope in safe condition. He was really in a situation that he could have known at all times the condition of the rope.

"(10) The jury are instructed that derricks, with their pulleys, ropes, and other appliances, used in raising or lowering heavy rocks, are liable to wear out, to break, to become defective and dangerous, and any employer, whether corporate or not, employing such agencies, is charged with notice of this fact, and consequently is bound to exercise a degree of watchfulness over them, commensurate with the nature of the business in which they are employed, and the consequences incident to the neglect. Therefore, if an employer whether corporate or not, fails to make frequent examinations of its machinery and appliances, or fails to take other measures or precautions necessary to prevent such appliances and ma-

chinery from becoming defective and dangerous from natural causes, and if from such defects, which might have been known by the use of ordinary care and diligence, an employee suffers injury without his fault, negligence may be predicated thereon, as such omission would be regarded as negligence."

Of course, a railroad company is required to exercise diligence in keeping its machinery in good order; but where it attempts to do the same through an agent or servant, it is not liable to that agent or servant for injuries resulting from defects in the machinery which that agent or servant could and ought to have remedied.

"(11) The jury are instructed that the law will not allow the machinery of the defendant, in constant use, to be out of repair for want of ordinary care and skill in its management, and it is a question of fact for the jury to find from the evidence whether the defendant might have known, by the exercise of ordinary and reasonable care and diligence, that the machinery was unsafe and dangerous."

This instruction is clearly misleading. It is a virtual instruction to the jury to find for the plaintiff, for it wholly ignores the alleged obligation of the plaintiff to keep the rope wet, and virtually says that if the defendant knew or "might have known, by the exercise of ordinary and reasonable care and diligence, that the machinery was unsafe and dangerous" the plaintiff might recover. Now, the defendant did know that the machinery would be unsafe and dangerous if the rope was not kept wet, and it was bound, through the plaintiff, or some other employee to keep the rope wet, but it did not do so. This instruction is erroneous in wholly ignoring the real and material question involved in the case.

"(12) The jury are instructed that it is the duty of defendant to keep a sufficient force at hand and of capacity sufficient to discover obvious defects in its machinery, and apply the remedy. Negligence to keep defendant's machinery in a reasonably safe condition, if injury or loss occur thereby, the defendant will be liable, and it ought to be so liable, because it is required to exercise reasonable and proper care to see that its machinery is in proper condition and to guard against defects that may arise from use or other natural causes. From this responsibility defendant cannot be relieved, except by showing that the defect was sudden and unforeseen, or that it could not be discovered or remedied by ordinary care or foresight."

This instruction is about as bad as instruction No. 11. It virtually instructs the jury to find for the plaintiff, for it says that the defendant could not be relieved from responsibility "except by showing that the defect was sudden and unforeseen, or that it could not be discovered or remedied by ordinary care or foresight." Now, the defendant admits that the defect was such as could have been discovered, foreseen, and remedied by ordinary care and fore-

sight; and it claims that it was the duty of the plaintiff, under the instructions from the superintendent and foreman of the work, to discover, foresee, and remedy such defect. Indeed, the defendant claims that all parties at all times knew of the danger, and that it was the plaintiff's duty to remedy the same.

"(13) The jury are instructed that if defendant did not appoint a foreman or other person, whose business it was to examine, supply, repair, or remedy defective machinery in actual use, it is guilty of negligence in refusing to do something that a reasonable employer would do. If it does appoint a foreman or other person to represent defendant in this regard, and such foreman or other person omits his duty when he has knowledge of defects existing in machinery in use, or fails to ascertain or remedy defects he ought to have known or might have known by the exercise of reasonable and proper care on his part by examining and inspecting the same, his negligence will be the negligence of the defendant."

Did the court, by this instruction, mean that the defendant should have appointed some other person than the plaintiff to examine the machinery and keep it in proper condition? The jury may have so understood the court; and, if so, the instruction was misleading; for the plaintiff was amply competent to take care of the rope and see that it was wet. Or if the court did not mean to say that the defendant should have appointed some other person than the plaintiff, then did the court mean to say that "his [the plaintiff's] negligence will be the negligence of the defendant?"

"(15) Negligence, as applied to the facts in this case, is the failure to observe that care and circumspection which ordinarily prudent men observe, considering the circumstances surrounding the performance of the given act; in other words, it is a failure to observe that care in view of the consequences that may result from negligence fairly commensurate with the perils or dangers likely to be encountered."

This instruction is subject to substantially the same criticism as several of the others. The defendant admitted that the accident was caused by negligence, but claims that the negligence was that of the plaintiff, and not that of the defendant.

The judgment in this case must be reversed. Many of the instructions, as before stated, are irrelevant and inapplicable under the facts of this case; and while they may be correct as abstract propositions of law, or as applied to the facts of some other case, yet, under the facts of this case, they are misleading and erroneous. And it is a general principle that irrelevant instructions, though correct as abstract propositions of law, if containing matters which might mislead the jury under the facts of the particular case in which they are given, are erroneous. The special findings of the jury show that they were misled from some cause in several particulars. From some of the special findings it would seem that the

jury believed that if the instructions of the superintendent and foreman to the employees of the company to keep the rope wet were general to all concerned, including the plaintiff, and not special and particular to him, he was not bound to obey such instructions or to give any attention to them. This was certainly erroneous. The plaintiff had no more right to disregard instructions given to him along with others than though they had been given to him specially. We think the judgment in this case should be reversed because of the manner in which the jury answered the special questions submitted to them. As before stated, some of their answers were untrue, some of them were evasive, and many of them were so unsatisfactory as to lead to the belief that the defendant did not have a fair and impartial trial; and when a jury renders a general verdict and makes special findings by answering special questions submitted to them, and some of the special findings are not true and some of the answers given to the special questions are so evasive and unsatisfactory as to lead to the belief that the party against whom the jury rendered its verdict did not have a fair and impartial trial, the verdict and findings should be set aside and a new trial granted.

Judgment reversed.

BALDWIN
v.
ST. LOUIS, K. AND N. W. R. CO.

(*Advance Case, Iowa. April* 9, 1884.)

In an action for a personal injury a plaintiff cannot be deemed to have been necessarily guilty of contributory negligence, if the danger might have been seen, and avoided if seen.

Where a jury, by a finding contrary to evidence, exclude from their consideration a fact which, although not necessarily of a determinative character, is nevertheless very important, a motion for a new trial must be granted.

A trial court does not commit error in refusing to instruct the jury that the defendant is not liable to the plaintiff for the negligence of its other servants and employees," etc., because such an instruction would preclude a recovery by an employee of a corporation for the negligence of any other employee, of whatever grade he might be, and even if he was not a co-employee.

APPEAL from Lee District Court.

Action for a personal injury alleged to have been sustained by the falling of a pile of lumber owned by the defendant and piled by it on its premises. The plaintiff was employed by the defendant as a carpenter in building a round-house. A short distance from this house were two piles of lumber, which were so near each

other as to be in contact. The two piles are described by the plaintiff in his testimony as "a small pile and a larger one." The plaintiff and another carpenter, while engaged in their duties, were taking a stick of timber from the small pile when a portion of the large pile fell and caused the injury of which the plaintiff complains. The plaintiff avers, in substance, that the defendant was guilty of negligence in that it constructed the pile so as to be dangerous and allowed it to remain so. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

Anderson Bros. & Davis and Geo. F. Hatch for appellant.

Browne & Browne for appellee.

ADAMS, J.—The defendant denied all negligence upon its part, and averred that the plaintiff was guilty of negligence which caused the injury. The alleged defect in the construction of the pile that fell consisted in using cross-strips of insufficient length. The pile consisted of three tiers of timber. Precisely how long the cross-strips were is not shown. They were long enough, as we infer, to pass through the middle tier and reach into the outside tiers, but not long enough to reach through the outside tiers. The disturbance of the small pile, by taking a stick of timber therefrom, either removed, as we infer, a needed support from the larger pile, or jostled it. The defendant insists that the plaintiff saw, or should have seen in the exercise of reasonable care, how the pile was constructed, and that if such was the fact he was guilty of contributory negligence. In the determination of the fact it became an important inquiry as to whether there was anything to prevent the plaintiff from seeing how the timbers were piled. On this point the other carpenter who was working with the plaintiff was examined as a witness, and testified in these words: "There was nothing to prevent any one that was working there from seeing how they were piled." No witness testified to the contrary. When the case was submitted to the jury a special interrogatory was propounded, as follows: "Was there anything to prevent the plaintiff from seeing the manner in which the timbers were piled?" To this interrogatory the jury answered, "Yes." This finding was not only unsupported by the evidence, but directly contrary to the evidence. A motion for a new trial was made upon this ground, but overruled. The defendant assigns the overruling as error. In an action for a personal injury the plaintiff cannot be deemed to have been necessarily guilty of contributory negligence if the danger might have been seen, and avoided if seen. Greenleaf *v.* Dubuque & S. C. R. Co., 33 Iowa, 59. Somewhat depends upon the duty which the injured person was discharging, and somewhat upon the obviousness of the danger. The fact inquired about was not then, necessarily, of a determinative character. It was nevertheless a very

important fact. It should properly have had a large influence. The jury excluded it from their consideration by finding contrary to the fact. In view of its importance, as we look upon the case, we feel constrained to say that we do not think that the defendant had a fair trial, and that the motion for a new trial should have been sustained.

One other question is presented which may arise upon another trial, and which accordingly calls for a determination. The defendant asked for an instruction in these words: "The defendant is not liable to the plaintiff for the negligence of its other servants and employees; accordingly, if you find the plaintiff was injured by reason of the negligence of his fellow-servants or fellow-employees, then he cannot recover." The court refused this instruction, and the refusal is assigned as error.

If there was any negligence in the manner in which the timber was piled, it was doubtless the negligence of some one who might be denominated an employee. The first part of this instruction, it appears to us, is objectionable. It would preclude a recovery by an employee of a corporation for the negligence of any other employee, of whatever grade he might be. The last part of the instruction, respecting the negligence of a co-employee, might, we think, properly enough, have been given, but the instruction as a whole, we think, could not be, and we think that the court did not err in refusing it.

We do not feel called upon, as the case is now presented to us, to attempt to point out precisely who would be a co-employee, in such a case as this, as distinguished from an employee of a higher grade. The evidence may differ upon another trial, and it is impossible, therefore, to anticipate the precise question which may arise.

For the error pointed out under the first division of the opinion, we think that the judgment must be reversed.

PRICE

v.

HANNIBAL AND ST. JOSEPH R. R. CO.

(77 *Missouri Reports*, 508.)

Where a servant accepts employment knowing, as well as his employer, its perils, or continues in service after he acquires such knowledge, he has no claim for damages against the employer for an injury occasioned by such perils.

It is error to give instructions which are contradictory, or are not warranted by any evidence in the case.

APPEAL from Jackson Circuit Court.
Geo. W. Easley for appellant.
W. D. Carlisle and A. J. Blethen for respondent.

HENRY, J.—This action is for the recovery of damages for the death of plaintiff's husband caused by injuries received by him, at defendant's round-house in the City of Kansas, on the 24th day of January, 1879. The deceased was employed by defendant as a fireman upon its locomotive engines. Plaintiff had judgment for $5000, from which defendant has appealed.

It was stipulated that the following facts should be taken as admitted by both parties: That the engine-house was not lighted on the night of the injury to Price, in any other manner than by the small hand-lamps carried by a portion of the employees; that the deceased, and the person who backed the engine into the stall, were both well aware of the fact that the engine-house was not lighted; and both the deceased and the said person handling the engine had known that said engine-house had not been lighted from the time it was built, up to the time of the accident; that the deceased lay down between stalls two and three in said engine-house, from half an hour to an hour before the injury, and fell asleep; and in his sleep, a short time before the injury, turned over so that his foot lay on the rail of the track of the stall, and that the engine was backed over or against his foot by one of defendant's agents or servants, so that his foot was injured to such an extent that amputation became necessary, from which amputation he died; that plaintiff was the widow of the deceased, R. B. Price, and still is such widow.

The testimony for plaintiff proved that the railroad tracks in a round-house are used for putting engines on and are called "stalls"; that the space between them is eight or ten feet wide, and there are no walls or fences between the stalls. The round-house was built in August or September, 1878, and the deceased and other employees of defendant, with the knowledge and consent of the company, had been sleeping in the round-house in the space between the stalls, the most of the time after its erection, until the death of the deceased. He was seen asleep on the night in question, within two or three feet of the track. A short time before the engine which passed over his leg went into the round-house, no part of his body was on the track. There were no lights in the house at the time except small tin hand-lamps or torches carried about by the men in their hands. There were no stationary lights. The fireman who ran the engine in knew that men were sleeping between the stalls. Requisition had been made by the foreman of the engine-house for lights for this house on the 9th day of Sep-

tember, 1878, but they were not furnished until after Price was killed. The bell on the locomotive was rung as usual that night when it started to the round-house, about sixty yards from the round-house. This was the only and usual signal. The employees were permitted and encouraged by the foreman of the engine-house to sleep in the round-house.

These were substantially the facts established by the evidence, and the court refused an instruction asked by defendant, that on these facts, plaintiff was not entitled to recover. The deceased and the fireman, who ran the engine into the round-house, were fellow servants, and if his death was occasioned by the negligence of the fireman, plaintiff was not entitled to a verdict.

If it be conceded that the defendant owed a duty to its employees to provide the round-house with lights, and that the death of Price is to be attributed to the neglect of that duty, yet Price was aware that it had been neglected ever since the erection of the house, four or five months before he was injured. He was aware that on that night there were no lights in the house, and he had every reason to know that there would be none. He had slept there most of the time after the house was built until the night in question. He was aware of the danger to which he exposed himself by sleeping in such a place. It was not only carelessness, but such carelessness as amounted to recklessness on his part to voluntarily place himself in such danger. It is no answer to this to say that he was encouraged to sleep there by defendant, or that the service he was engaged in required it, because, even if that be so, he continued in that service, and repeatedly, almost continuously, placed himself in that peril, knowing as well as the company, its nature and extent. In such case the servant assumes the risk. Keegan *v.* Kavanaugh, 62 Mo. 232; Porter *v.* Hann. & St. Jo. R. R. Co., 71 Mo. 67.

The evidence on the part of plaintiff—none was introduced by defendant—discloses such a clear case of contributory negligence on the part of the deceased, as precludes a recovery by plaintiff. There was no evidence that the company required defendant or any of its employees to sleep in the round-house. All that the evidence tends to prove on that subject is, that knowing that they were in the habit of doing so it was permitted, and in some instances, encouraged; but in either aspect of the case, a servant who takes employment knowing as well as the employer the risk, or continues in that service after he acquires that knowledge, has no claim for damages against the employer for an injury he may sustain resulting from the risk he has taken. If by the terms of the employment a servant were required to sleep in that round-house between the stalls, and he was fully aware of the danger to which it would expose him, he has his option to enter or decline the service, but, accepting it, he assumes all such risks as are equally as

well known to him as to his employer. "If the risk is such as to be perfectly obvious to the sense of any man, whether servant or master, then the servant assumes the risk." Keegan *v.* Kavanaugh, supra.

The court in the second, third, fourth and fifth instructions given at defendant's instance, properly declared that if the deceased was injured in consequence of the negligence of the servants of defendant engaged in putting the engine into the round-house, plaintiff could not recover, but in the first given for plaintiff, told the jury that if his injury was occasioned by the negligence or unskilfulness of defendant, its agents or servants, while running one of its locomotives, and that Price at the time exercised ordinary care and prudence, plaintiff should recover. This was in direct conflict with those given for defendant.

In the plaintiff's second instruction the jury were told that although Price's own negligence contributed directly to his injury, that would not preclude plaintiff's recovery, if defendant could have avoided the injury to him, after notice that he was lying partly on the track. There was not a scintilla of evidence of any such notice, and it was, therefore, error to give the instruction.

All concurring, the judgment is reversed.

MANNING

v.

BURLINGTON, C. R. AND N. R. CO.

(*Advance Case, Iowa. December* 12, 1883.)

Plaintiff who was employed as a sweeper by a railroad company was injured by stepping into a hole in the round-house. In an action brought by him against the company to recover damages there was no evidence that plaintiff had ever been employed about the round-house before. The court nevertheless instructed the jury that if plaintiff had been employed about the round-house before and knew of the excavation he could not recover.

***Held*, that as the instruction was based upon facts of which there was no no proof, it was erroneous.**

APPEAL from Lynn District Court.

The plaintiff, an employee of the defendant, brings this action to recover damages sustained by stepping into a hole in defendant's round-house, in which plaintiff was employed. There was a jury trial, and a verdict and judgment for the defendant. The plaintiff appeals.

Blake & Hormel and J. B. Young for appellant.

J. &. S. K. Tracy for appellee.

DAY, C. J.—The evidence shows that prior to September 3, 1881, the plaintiff was in the employ of defendant, when he had a rib broken and was laid up for nearly five months. The evidence does not show what the plaintiff's employment was prior to September third. On the twenty-seventh of March, 1882, the plaintiff was employed by the defendant as a sweeper, and about 8 o'clock in the morning of the same day he sustained the injury for which he sues by stepping into a hole in the round-house, where he was engaged as a sweeper. The evidence shows, without conflict, that plaintiff had never been in the round-house before the day he got hurt, unless it was to go through it when he went to his work in the morning, and that he did not know of the existence of any holes there. The court instructed the jury as follows:

"If you find from the evidence that plaintiff was an employee of defendant in the round-house in question, and working about this excavation prior to the alleged accident, and knew of its location and unsafe condition, and continued to work about there without objection, and by accident stepped or fell into it, then he could not recover."

Within three days after the verdict the plaintiff filed exceptions to this instruction, which were, by reference, incorporated into the motion for a new trial. The exception taken to the instruction is that there was no evidence adduced showing or tending to show that plaintiff ever worked in the round-house in controversy before the morning of the day when he received the injuries complained of. The exception to this instruction is well taken. It has no basis whatever in the evidence. It has frequently been held by this court that it is error to give an instruction based upon a state of facts of which there is no proof. Hess *v.* Wilcox, 58 Iowa, 380, and cases cited; Clark *v.* Ralls, 58 Iowa, 201; Star Wagon Co. *v.* Swezy, 59 Iowa, 609.

For the error in giving this instruction the judgment is reversed.

McCUNE

v.

NORTHERN PACIFIC RY. CO.

(Advance Case, U. S. Circuit Court, Oregon. January 9, 1884.)

In an action against a railroad company to recover damages for injuries sustained while working upon the construction of a railroad bridge, the negligence alleged on the part of the defendant was the furnishing of an insufficient stay-lath. The company defended on the ground that the plaintiff

had been guilty of contributory negligence in attempting to use the stay-lath as a scaffold, and a verdict was rendered against it.

Held, that a new trial would not be granted to give the company an opportunity of defending on the ground of accident, as it was not clear that the verdict on such trial would be for defendant.

Where a party has a defence to an action arising out of the testimony in the case, and omits to present it to the jury, but relies upon a defence involving a different, if not inconsistent, conclusion from the testimony, a new trial will not be granted to enable him to submit the case to another jury upon this untried question, unless it clearly appears from the evidence that he is entitled to a verdict on that ground, and then only upon the payment of the costs of the first trial.

MOTION for a new trial in an action for injuries to the person. The opinion states the facts.

William H. Effinger and Arthur C. Emmons for the plaintiff.

Rufus Mallory for the defendant.

DEADY, J.—The plaintiff, a citizen of Indiana, brought this action against the defendant, a corporation formed under a law of the United States, to recover ten thousand dollars damages, for an injury to his person occasioned by a fall from an unfinished bridge, on which he was at work for the defendant, which fall was caused by the negligence of the defendant in providing the scaffolding, whereon the plaintiff, in the course of his employment, was required to work; and without any negligence on the part of the plaintiff. The answer of the defendant contains a denial of any negligence in the premises on its part, and a plea or defence that the injury complained of was caused by the negligence of the plaintiff.

The cause was tried with a jury on November 15th and 16th, and there was a verdict for the plaintiff for two thousand five hundred dollars. And now the defendant moves the court for a new trial on the grounds: 1. That the evidence is insufficient to justify the verdict; and 2. For errors of law occurring at the trial.

On the argument of the motion the second ground was not pressed, and the only point relied on is that the verdict should have been for the defendant because the testimony did not warrant the conclusion that the injury to the plaintiff was caused by the negligence of the defendant; but that upon the whole evidence the reasonable conclusion is, that the injury, if not caused by the plaintiff's carelessness, was the result of accident, for which no one is to blame.

The evidence given on the trial goes to show that the plaintiff was injured while working on the defendant's bridge at the second crossing of Clarke's Fork of the Columbia river, in Missoula county, Montana, on March 2, 1883; that he had been in the employ of the defendant for nearly three years prior thereto—most of the time with the engineers—and about half a month on the

bridge, during which period he had, by overwork, put in nineteen days' labor; and that two bents of the bridge, of two stories each, of about twenty feet across, and the same distance apart, were then raised on the west bank of the river.

When the two lower of these bents were raised, they were kept in position by means of a gang-plank and three or four pieces of timber, called stay-laths, laid across from bent to bent, and spiked down to the caps. This plank was four by sixteen inches in size, and placed somewhat to the left of the middle of the caps, while the stays were laid on either side of the plank, and about three feet apart.

These stays were poles or green fir-trees, from four to six inches in diameter, and had been cut in the woods near by, within two weeks, by the plaintiff and others, under the direction of the foreman of the work. Both they and the plank were intended primarily to hold the lower bents in position while the upper ones were being raised and the girders put in place; but they were also necessarily used as scaffolding during these operations, particularly the plank, and none other was furnished.

When the plank and stays were spiked upon the lower bents, the top bents were then raised upon them—the cap of the former serving as the sill of the latter. The top bents consisted of a cap and four posts, each about twelve inches square. When the bents were in position and stayed, two girders were laid across the lower story, from cap to cap, next to the outer post, and spiked down as a permanent stay or tie.

On the occasion in question, the first girder was being placed on the two bents next to the river. Several men were engaged at the work, including the plaintiff. The girder was put upon a dolly and pushed along from the direction of the bank on the gang-plank until the farther end was pretty well across the space between the bents, when it was swung diagonally around and turned over on its edge—the men standing on either side of it on the gang-plank, cap, and stays, as they could or was convenient—then taking hold of it with their cant-hooks and launching it along in the direction required. When the farther end of the girder was upon the farther cap, and just to the left of the post next to the outside one, the plaintiff, who was on the right of the girder, and the farthest man forward on that side, stepped from the cap around and outside of the inner post, on to the end of the stay, which projected beyond the cap some three or four feet, for the purpose of making room for the man immediately behind him, and taking hold of the girder near the end with his hook, and helping put it into place. As he stepped upon it, and before he put his hook to the girder, the stay broke and let him fall on to the stones and frozen ground beneath, a distance of about twenty feet, whereby his left hip was temporarily injured, and his left

arm permanently disabled by the fracture of the olecranon, or elbow.

The case was tried by the defendant upon the theory that the stays were not sufficient for scaffolding, and were not intended to be so used, and that the plaintiff was guilty of negligence in stepping upon the stay, as he did, which negligence was the cause of his injury. But the weight of the evidence is directly contrary to this theory. Nor is it apparent how the defendant could escape the charge of negligence in the matter of providing sufficient scaffolding whereon to do this work, unless these stays were fit for the purpose. No proof was offered on either side as to the probable strength of such timbers, but I think it common knowledge, upon which the court and jury may act without further evidence, that a sound fir-tree, from four to six inches in diameter, would support the weight of the plaintiff (one hundred and sixty-five pounds), and much more. The only apparent danger in using these stays as scaffolding arose from their shape, and not their want of strength. Being round and comparatively small, a person was liable to lose his balance and fall from them, and if any one had been injured by such means it is not apparent how the defendant could have escaped liability therefor on the ground of not having provided sufficient scaffolding. And in my judgment there ought to have been at least three planks thrown across the opening between the bents—one in each space between the posts—before any work was attempted thereon. On his examination in chief, the plaintiff said that after his fall he examined the broken stay at a distance of twenty feet from it, meaning, as I suppose, from the ground where he fell to the top of the bent where it broke, and that it broke nearly square off, and appeared to be a fresh break; but upon re-examination by his counsel, and in answer to a direct question, he said that he looked at it "afterward" and he thought "it had a crack on top."

It does not appear from tho evidence whether this impression, that the stay was cracked on top, was received at the examination when he thought it was a fresh break or "afterward," and if so, how long; nor does it appear whether the end of the stay fell to the ground with the plaintiff, as it would if it had broken square off, or whether it was simply split down and remained attached to the stay at the bent.

The plaintiff appears to have been removed from the locality to a hospital immediately after the injury, and it does not appear that he was ever on the ground again. And supposing, as it is probable, that his only examination of the break in the stay was a cursory glance upward, as he lay on the ground, to the top of the bent, where the fracture occurred, I do not think much reliance can be placed on his impression as to whether the break was altogether a fresh one or not. The defendant was in the possession of

the stay when it broke and ought to be able to produce it or account for it, or produce a witness who had examined it carefully and could testify as to its condition. But it offered no evidence on the subject nor any excuse for not doing so.

The foreman was on the ground at the time of the occurrence, ang in justice to both parties, ought to have looked into the circumstances of the case with a view of ascertaining how the casualty occurred, and who was to blame for it, if any one; and presumably he did so. But although he was called as a witness by the defendant, no question was asked him on the subject. No question was made on the trial but that Mr. Anderson, the foreman or superintendent of this work, stood in the place of the defendant, and that his negligence, if any, was the negligence of the defendant; but the same was tacitly conceded, and the court so instructed the jury. The defendant did not ask for any special instruction to the jury, nor take any exceptions to the charge given by them to the court, but was content with the presentation and argument of its case to the jury upon the question of fact, that the staylaths were not used nor intended to be used for scaffolding, and therefore the plaintiff was guilty of negligence in attempting, as he did, to use one of them for that purpose.

And in this connection the court said to the jury: "This case must turn upon the question, Was the negligence in regard to the stay-lath the negligence of the defendant or the plaintiff, or was the injury the result of an accident for which neither party is to blame? If you find that the injury sustained by the plaintiff was caused by the negligence, in this respect, of the defendant, your verdict should be for the plaintiff; but if you find that such injury was caused by the negligence of the plaintiff, or that it was the result of accident, then your verdict should be for the defendant."

On the proposition that the stays were not used nor intended to be used as scaffolding, the case, on the evidence, was clearly against the defendant, and a verdict for the plaintiff on that issue ought not to be disturbed by the court. But it appears to me that the question of whether this injury was the result of accident, is not so clear. And if the defence had been made to the jury on that ground, the verdict might have been different.

But in the consideration of the question, weight must be given to the fact that the defendant, with the apparent ability to show the actual condition of the stay at the time of the fall, failed to do so, or give any excuse therefor. And then, ought the court to grant a new trial to enable the defendant to submit the case to another jury upon the proposition that the injury was the result of accident, notwithstanding it might have done so on the former trial? It may be, if there was no room for doubt or difference of opinion on this question, that the court ought to grant a

new trial upon the condition that the defendant pay the cost of the former one, in which it was fairly cast upon the case as then presented by it.

But it does not appear that the case is so clearly one of accident that it would be the duty of the court to instruct the jury to find a verdict for the defendant on that ground.

For, if possible, it is highly improbable that a fir pole or tree, at least four inches in diameter, broke off or split down close to the cap of the bent simply with the plaintiff's weight, unless it was originally defective or had since been injured in some way; and in either case, the injury might be the result of accident, or the negligence of the plaintiff or defendant. For instance, if the defective condition of the stay could not have been known and provided against by the defendant, by the exercise of ordinary prudence and diligence, the fall of the plaintiff therefrom was so far an accident, for which the defendant is not responsible. But if the defendant could by such means have prevented the injury, then it is liable therefor. And if the defect was so apparent that the plaintiff, by the exercise of ordinary prudence and diligence, under the circumstances, ought to have observed it and not gone upon the stay, then his negligence contributed to the result, and the defendant, however negligent, is not liable to him for the injury.

So that it cannot be said upon the evidence that this is a clear case of accident. The most that can be said is, that a jury might find it so, but probably would not. And upon the consideration of the defence of accident, the further question would arise, Ought not the defendant to have provided a safer and better kind of scaffolding than it did? In my judgment, there ought at least to have been a timber or plank, like the one called the gang-plank, laid across from bent to bent in each of the three spaces between the posts, instead of only one, and those few round poles or stays. This would have given only four feet in width of scaffold to twenty feet in width of operation.

I know the witnesses said that this bridge was scaffolded, in this respect, in the same way that the other bridges were that were built on the road. But that does not settle the question, by any means, of what is sufficient scaffolding. And in as simple a matter as this, the court and jury can see for themselves that the scaffolding in this case was insufficient in both character and quantity.

The only ground upon which this motion can be allowed was correctly stated on the argument by the counsel for the defendant. It is this: The motion must be allowed, if upon the trial the court, at the request of the defendant, would have been bound to instruct the jury to find for it for the reason that it appeared beyond a question, from the evidence, that the injury to the plaintiff is the result of accident, and not the negligence of the defendant. But in my judgment the case is open to question on this point, and the

court must have refused the instruction and submitted the question to the jury.

The defendant having chosen to put the case to the jury on the ground that the plaintiff was guilty of negligence in attempting to use the stay-lath as a scaffold under any circumstances, and it not appearing certain that a different result would follow from a trial in which the defence would rely on the proposition that the injury to the plaintiff was the result of accident, the motion for a new trial is denied.

JACKSON
v.
KANSAS CITY, LAWRENCE AND SOUTHERN KANSAS R. R. CO.

(*Advance Case, Kansas. April* 1, 1884.)

Where the step of a railroad engine is slightly defective, and the conductor of the train has full knowledge of the condition of such step, and continues to use it, he cannot recover damages from the railroad company for injuries claimed to have resulted from the defective condition of the step and received by him while using it.

The reversal of an engine in switching and in making up trains is not negligence per se, and negligence is never presumed without proof; but in all cases must be proved.

ERROR from Sumner County.

Herrick & George, McDonald & Parker, Isaac G. Reed for plaintiff in error.

J. Wade McDonald, A. A. Hurd for defendant in error.

VALENTINE, J.—This was an action brought by William M. Jackson againt the Kansas City, Lawrence & Southern Kansas R. R. Co., to recover damages for injuries received by him while in the employment of the railroad company as a conductor of one of its construction-trains. The plaintiff alleges in his petition below that these injuries were caused by the negligence of the railroad company. The case was tried before the court and a jury, and after all the plaintiff's evidence was introduced, the defendant demurred thereto, upon the ground that it did not prove any cause of action in favor of the plaintiff and against the railroad company. The demurrer was sustained by the court. The plaintiff then moved the court for a new trial upon various grounds, which motion was overruled. Afterward, the plaintiff brought, or attempted to bring the case to this court for review.

Now, assuming that the plaintiff has got his case into this court,

and assuming that the plaintiff exercised proper care and diligence on his part to avoid the injuries of which he now complains; still, we do not think that he proved any negligence on the part of the railroad company, and, therefore, and for this reason, if for no other, we think the court below did not err in its various rulings against the plaintiff. We think it is unnecessary to comment upon the evidence or upon the facts of the case to any great extent; but perhaps it would not be out of place to state some of the principal facts. The plaintiff, as before stated, was the conductor of one of the construction-trains operated on the defendant's railroad, and he received the injuries of which he now complains while switching the engine and cars for the purpose of making up the train for a particular occasion. Just prior to the time when said injuries were received, the engine was on the main track of the railroad, without any cars attached thereto, and was being moved backward, toward the plaintiff, by the person in charge thereof, at the rate of from three to five miles an hour, and the plaintiff, seeing it coming, moved a switch-track and locked it, and, when the engine reached the point where he stood, he caught hold of the hand-holds and placed his right foot upon the step of the engine and was lifting his left foot from the ground to place it on the step of the tender, when the engine was reversed, and, in consequence of such reversal, his foot slipped from the step of the engine and fell upon the rail of the railroad track, and one of the drive-wheels of the engine passed over it and crushed it so badly that a part of the same had to be amputated. It is claimed that the step of the engine was defective, in not having sufficient guards at the sides, but it would seem that the plaintiff had full knowledge with reference to the condition of the step, and as full knowledge as any other person; hence, he cannot claim negligence on the part of the railroad company with respect to the step; for if the step was not fit for use, he knew it, and was guilty of contributory negligence in attempting to use the same after having full knowledge of its supposed defective condition. The L. S. & M. S. Ry. Co. *v.* McCormick, 74 Ind. 440; s. c., 5 Am. & Eng. R. R. Cas. 474; Pittsburgh, etc., R. R. Co. *v.* Sentmeyer, 92 Pa. St. 276; s. c., 5 Am. & Eng. R. R. Cas. 508; Umback *v.* L. S. & M. S. Ry. Co., 83 Ind. 191; s. c., 8 Am. & Eng. R. R. Cas., 98; H. & T. C. Ry. Co. *v.* Meyers, 55 Tex. 110; s. c., 8 Am. & Eng. R. R. Cas. 114; H. & T. C. Ry. Co. *v.* Fowler, 56 Tex. 452; s. c., 8 Am. & Eng. R. R. Cas. 504; De Forest *v.* Jewett, 88 N. Y. 264; s. c., 8 Am. & Eng. R. R. Cas. 495; Devitt *v.* Pac. R. R. Co., 50 Mo. 302; Dillon *v.* U. P. R. R. Co., 3 Dillon, 320, 324; Richardson *v.* Cooper, 88 Ill. 271; M. R. & L. E. R. R. Co. *v.* Barber, 5 O. St. 541, 559, 560; Coates *v.* Burlington, etc., R. R. Co., decided by supreme court of Iowa, Dec. 13, 1883, 17 N. W. Rep. 760; 2 Thompson on negligence, 1008; note to case of Ballou *v.*

The Chicago, etc., Ry. Co., 5 Am. & Eng. R. R. Cas. 480, 506; s. c., 54 Wis. 257.

The step, however, was not really defective, but was simply of a different pattern from those often used on railroad engines; and the plaintiff admits, in his brief, that the evidence does not show such a defective or unsafe condition of the step as to preclude its use, and he also admits that, except for the reversal of the engine, he would not have fallen or been injured. Besides, there was no necessity for the plaintiff to use the step at the time he did. And we certainly think that no negligence can be imputed to the railroad company on account of the use of said step by the plaintiff at the time he used it. Probably neither the plaintiff nor the railroad company was guilty of negligence in using said step.

This brings us to the question whether any negligence can be imputed to the railroad company because of the reversal of said engine. Now, no negligence was shown with respect to such reversal. The evidence shows that engines are often reversed in switching cars and in making up trains; and there was no evidence introduced tending to show that the engine in the present case was not reversed for a good and sufficient reason; and there was no evidence introduced tending to show that the person in charge of the engine had any knowledge that the plaintiff was on the engine, or attempting to get upon the same, at the time the engine was reversed. We suppose it will be admitted that the reversal of an engine is not negligence per se, and that negligence is never resumed without proof, but in all cases must be proved.

We would also refer to the following cases, as having some application to this case. The Mo. Pac. Ry. Co. v. Haley, 25 Kas. 35; s. c., 5 Am. & Eng. R. R. Cas. 594; Williams v. The A. T. & S. F. R. R. Co., 22 Kas. 117; McQueen v. C. B. U. P. R. R. Co., 30 Kas. 689, 692, and cases there cited; s. c., 1 Pacific Reporter, 139, 141.

The judgment of the court below will be affirmed.

Servants using Defective Apparatus with Knowledge of Defect.—The law is well settled by many authorities that if a person in the employ of a railroad company discovers that the appliances with which he is at work are unsafe and continues notwithstanding to use them without complaint, he is guilty of such contributory negligence as will preclude recovery for an injury occurring in consequence. Chicago R. R. Co. v. Munroe, 85 Ill. 25; Ladd v. Bedford R. R. Co., 119 Mass. 412; Georgia R. R. Co. v. Kenney, 58 Ga. 455; Ford v. Fitchburg R. R. Co., 110 Mass. 87; Michigan Central R. R. Co. v. Austin, 40 Mich. 225; Mehan v. S. B. & N. Y. R. R. Co., 73 N. Y. 585; Gibson v. Erie R. R. Co., 63 N. Y. 449; Crutchfield v. Richmond, etc., R. R. Co., 78 N. C. 300; Hamathy v. Northern, etc., R. Co., 46 Md. 280; Ft. Wayne & C. R. R. Co. v. Gildersleeve, 33 Mich. 133; Kielly v. Beecher, etc., Mining Co., 3 Sawy. 500; Hawley v. Northern Central R. Co., 2 Am. & Eng. R. R. Cas. 248; Green & Coates St. Pass. Ry. Co. v. Bresmer, 4 Am. & Eng. R. R. Cas. 647; Pittsburgh, etc., R. Co. v. Sentmeyer, 5 Am. & Eng. R. R. Cas. 508; Rains v. St. Louis, etc., R. R. Co., 5 Am. & Eng. R. R. Cas. 610;

Houston & T. C. R. Co. *v.* Myers, 8 Am. & Eng. R. R. Cas. 114; Louisville, etc., R. R. Co. *v.* Orr, 8 Am. & Eng. R. R. Cas. 94; Umback *v.* L. S. & M. S. R. Co., 8 Am. & Eng. R. R. Cas. 98; Sweeney *v.* Central P. R. Co., 8 Am. & Eng. R. R. Cas. 151; De Forest *v.* Jewett, 8 Am. & Eng. R. R. Cas. 495; Houston & T. C. R. Co. *v.* Fowler, 8 Am. & Eng. R. R. Cas. 504; Mayes *v.* Chicago, etc., R. Co., 8 Am. & Eng. R. R. Cas. 527; Watson *v.* H. & T. C. R. R. Co., 11 Am. & Eng. R. R. Cas. 213.

Riley, Admx.

v.

Connecticut River R. R. Co.

(135 *Massachusetts Reports*, 292.)

An action cannot be maintained against a railroad corporation for personal injuries occasioned to a brakesman in its employ by being struck by a bridge, while on a moving train, and resulting in his death, if the evidence wholly fails to show that he was using due care, or that his death was not instantaneous.

Tort, by the administratrix of the estate of John Riley, for personal injuries sustained by her intestate in his lifetime, while a brakeman upon a freight train of the defendant corporation. The declaration alleged that the injuries were caused by the intestate coming in contact with a bridge, which he was required to pass while in the discharge of his duties, and which was negligently maintained by the defendant. Trial in the Superior Court, before Rockwell, J., who reported the case for the determination of this court, in substance as follows:

The plaintiff offered to prove that the accident which caused the intestate's death occured at about eleven o'clock in the morning of July 29, 1881, at or near a bridge which crossed the defendant's railroad at Bernardston, and that he died the same day; that he had been in the defendant's employ about six weeks prior to the time of the accident; that, at the time of the accident, the train was running in a northerly direction, at the rate of fifteen miles an hour; that the intestate was on the train in the regular discharge of his duties; that the train consisted of twelve or fifteen cars, the first of which, next to the tender of the engine, was a close or box car, and next to said box car in the rear was a platform car without sides; that the intestate was last seen alive within about a quarter of a mile southerly of said bridge, at which time he left the tender of the locomotive and got upon the box car which was next in the rear of said tender, and was standing on the box car in the regular discharge of his duties; that he was next seen dead on the track, about one hundred rods on the northerly side of the bridge, after

the train had passed it, and when found the body was so mutilated that it could be recognized only by the clothing; that there was no blood on the track within about sixty rods north of the bridge, but, for the distance of about forty rods farther to the north, to the place where the body was found, there was blood on the track; that there was blood on the trucks of the platform car; that after the body of the intestate was found, his watch was found on the platform car, and his watch-chain, knife and bunch of keys were found scattered on the track from sixty to one hundred rods north of the bridge; that the bridge was only sixteen feet above the rails or track of the road; that the defendant was legally bound to maintain the bridge; that the car upon which the deceased was last seen standing was about ten feet nine inches high, and so high that his person, if standing, would come in contact with the bridge at the time of passing; and that there were no warning signals, guards, or "telltales" maintained on either side of the bridge to warn the brakeman of approaching danger.

Upon this offer of evidence, the plaintiff contended that the jury might infer due care and diligence on the part of the intestate; that the defendant was guilty of gross negligence, which caused the injury; and that the intestate survived the accident.

The plaintiff further contended that, if the intestate was in the exercise of due care, and the defendant was guilty of gross negligence, and thereby caused the injury, the plaintiff could recover, even if the intestate did not survive the injury.

The judge ruled that the action could not be maintained; and directed the jury to return a verdict for the defendant.

If the rulings were correct, the verdict was to stand; otherwise, a new trial to be had.

J. B. O'Donnell, for the plaintiff.

G. Wells, for the defendant.

By the Court.—This case cannot be distinguished fron Corcoran *v.* Boston & Albany R. R., 133 Mass. 507; s. c., 12 Am. & Eng. R. R. Cas. 226. The evidence offered wholly fails to show that the intestate was using due care, or that his death was not instantaneous. It does not sustain the burden of proof which the law places upon the plaintiff.

Judgment on the verdict.

Low Bridges.—As to injuries to servants struck by low bridges while upon moving trains see Wabash R. Co. *v.* Elliot, 4 Am. & Eng. R. R. Cas. 651; Pittsburgh & Conn. R. R. Co. *v.* Sentmeyer, 5 Am. & Eng. R. R. Cas. 508; Rains *v.* St. Louis, Iron Mt. & S. R. Co., 5 Am. & Eng. R. R. Cas. 610; Wells *v.* Burlington, C. R. & N. R. Co., 2 Am. & Eng. R. R. Cas. 243.

LUEBKE

v.

CHICAGO, M. AND ST. P. RY. CO.

(*Advance Case, Wisconsin. December* 11, 1883.)

To go under a car, standing alone on a side track, for the purpose of repairing it, is not a dangerous service, the risks of which the employee takes upon himself; and, in the absence of any testimony showing that a watchman was placed to protect such car, while the railroad company admits, by its answer, that according to the customs and regulations of the company such work should not be done except while the car is being protected by watchmen, or other suitable means, the case should not be taken from the jury. To provide against injury in such an employment is clearly the duty of the company.

APPEAL from Circuit Court, Milwaukee County.

Charles M. Bice for appellant, William Luebke.

John W. Cary & Burton Hanson for respondent, the Chicago, M. & St. P. Ry. Co.

ORTON, J.—The plaintiff had been employed by the company to work on repairing cars on two tracks, called repair tracks, which were kept locked except when a car had been repaired on one of the tracks and it was unlocked and the car run out. On the day of the accident, while the plaintiff was at work on the regular repair tracks, he, with another, was ordered by the foreman to go a short distance upon a side track, to repair a car standing there and detached. He did not know that they were to make up trains on this track, and apprehended no danger. While he was under the car making the necessary repairs, and where it was necessary for him to be for that purpose, an advancing train of cars struck this car under which the plaintiff was on his knees to repair, and pushed it over him and caused his injury. These are briefly the facts. There was no evidence that any watchman had been placed to guard this car so being repaired, or the plaintiff so repairing it, from danger from approaching cars on that side track. When it is considered that this kind of service upon the regular repair tracks was amply protected by locking up the tracks (a most praiseworthy precaution against danger from the negligence of others), the admission in the answer of the company to this action is candid and praiseworthy. The answer admits "that while cars are being repaired upon other than repair tracks, ordinary prudence, care, and the customs and regulations of the company, require that such work should not be done except while the car is being protected by watchmen or other suitable protection." This admission of

the answer sufficiently disposes of the claim, most unworthily made on the argument, that it was the duty of the repairer himself, who is compelled to go under the cars to repair them, to provide his own watchmen and look out for himself.

Before seeking to apply the well-known principles of law to such a case, it may be well to dispose of the position assumed by the learned counsel of the respondent, that this plaintiff took the chances and hazards of a most dangerous service. Is this so? When a car is standing still and disconnected from any power which could move it, and in a place where there was not the remotest reasonable suspicion or apprehension that it would be moved or at all disturbed, where is the danger? There would be nearly the same danger in degree, and the same in principle, if a person should go under a two-horse wagon in a farmer's yard, to repair it, without any apprehension that the farmer would hitch to it while he was so under it, and draw it over him. If the rule is to be established that any railway service is dangerous, because all employees are careless and negligent whose duty it is to guard him from injury, then there is no railway service which is not dangerous, and the employee takes his chances, not that the particular service or duty is dangerous in itself, but that it will be made so by the habitual negligence of everybody who might be able, by his negligence, to injure him. Under the effect of such a rule, even travelers and passengers take the chances of a most hazardous and dangerous method of travel, and cannot complain if they are injured by such negligence as is the normal characteristic of railway service.

There are some presumptions upon which any one connected with the railway service, either as employee or passenger, has a right to rely. They are (1), that the company has provided all necessary and proper means and appliances for their protection; and (2), that the employees themselves will do their duty in such responsible service. In this view, the business of repairing this car by the plaintiff, by going under it, which was necessary, was not dangerous service. The car would not move over him, unless moved by some other force applied by the gross negligence of some one else. The car standing still and disconnected was not dangerous any more than any other inert body, and it was perfectly safe to lie down under its wheels, if necessary, as it could do no harm. The danger of this service consisted in the outrageous carelessness of somebody else in the management of the trains on that track, which he was not only not bound to presume, but he had no right to presume or expect. No! the service was not dangerous in itself, like going between cars, when in motion, to couple or uncouple them, or to go upon cars when in motion to set the brakes, or other similar services, concerning which it has been held the service is dangerous, and the employee takes the chances and

hazards thereof. Here the company admit that it was their duty to have had a watchman on this ground to prevent this collision, or at least to have done what they reasonably should have done to prevent it. The Circuit Court granted a non-suit in the case on the testimony in behalf of the plaintiff. There was no evidence whatever that the company had provided such a watchman. If the case had been fully tried, the company might have proved that such an admitted and reasonable precaution had been taken. In such a state of the case, what is the presumption of the law as to this most important fact? If a watchman had been provided for that duty, the first presumption would be that he was on duty at the proper place; and if so, secondly, that he discharged that duty to prevent, if possible, the moving of the cars against the one under which the plaintiff was, so unconsciously of danger, at work, and the collision would not have occurred.

The conclusion from these presumptions is, that the company did not, in this instance, provide a watchman or any other precaution, which they admit in their answer it was their duty to do. Besides, negatively at least, there was proof that no watchman was there. The company sought to show, on cross-examination of the plaintiff, that the person who was working with him under the car, or some one who did not arrive on the ground and who was to assist him in the work, was the watchman; but this is not only denied by the plaintiff, but common sense would indicate that under the car being repaired was no proper place for a watchman to prevent a train of cars, far distant on the track, from running against the one under which he was at work. It may be, if it was in proof that the company employed a watchman at this place who was competent, the company performed its full duty. To this extent, at least, they admit their duty, and that is sufficient for this case. This question is more one of fact than of law in this case, because the defendant company admit the law as claimed on behalf of the plaintiff. But the authorities are abundant that the company owed the absolute duty to the plaintiff, situated as he was, in the common and necessary business of the company, to have had a competent watchman to guard against his injury from moving the car under which he was at work. The cases of Railway *v.* Lavalley, 36 Ohio St. 221, 5 Am. & Eng. R. R. Cas. 549, and Vose *v.* Railway, 2 Hurl. & N. 728, are nearly parallel and closely in point, and many cases in this court are in principle the same. See Wedgewood *v.* Ry. Co., 41 Wis. 483; Bessex *v.* Ry. Co., 45 Wis. 477; Smith *v.* Ry. Co., 42 Wis. 526. Many other cases might be cited to show that the duty to provide a watchman, or some other proper precautions, against the injury of one doing such service, was clearly that of the company; but this duty, as said several times before, is admitted in the answer. It is not perceived how the question of co-employees, or of the contributory negligence of

the plaintiff, can have any place. The case should have gone to the jury, and the evidence upon the most vital issue should have been presented; for as the case stood when the non-suit was granted, the defendant was clearly in fault in not providing a watchman, or some other proper precaution, to guard the safety of the plaintiff when placed by the company where he could not look out for himself.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

Cassoday, J., dissenting. In answer to a question from the bench, counsel for the plaintiff frankly admitted, in effect, that if there was any negligence on the part of the defendant, it consisted in the fact that the foreman ordered the plaintiff to do the repairing in question at the place of the injury, without providing a watch, or knowing that the watchman was on duty to guard him during the time of such repairing. If counsel was correct in that statement, then I apprehend the court would be agreed that there can be no recovery; for it is well settled by this court that such foreman was at the time a co-employee with the plaintiff, and that the latter could not recover for any injury resulting from the negligence of the foreman. Brabbits *v.* Railway. Co., 38 Wis. 289; Howland *v.* Railway Co., 54 Wis. 226; s. c., 5 Am. & Eng. R. R. Cas. 578; Hoth *v.* Peters, 55 Wis. 405; Dwyer *v.* Amer. Exp. Co., 55 Wis. 453; s. c., 8 Am. & Eng. R. R. Cas. 159; Schadewald *v.* Railway Co., 55 Wis. 577; Heine *v.* C. & N. W. Ry., 17 N. W. Rep. 420. In the last case cited a strenuous effort was made to induce this court to recede from the rule thus settled, and to follow what was characterized as the more humane and reasonable rule adopted in Ohio and some other States, but which had long ago been expressly repudiated in this State. Moseley *v.* Chamberlain, 18 Wis. 705. The effort, however, was unavailing.

The case of Ry. Co. *v.* Lavalley, 36 Ohio St. 226; s. c., 5 Am. & Eng. R. R. Cas. 549, cited in the opinion of the majority of the court, puts the liability of the company, on the ground that the foreman was negligent in directing the plaintiff below to repair the car without either keeping watch himself or requiring some of his other men to keep such watch. That, as I understand, is the very doctrine which this court has expressly refused to adopt; and, in so far as it may have received the sanction of the majority opinion, it is, as it seems to me, in direct conflict with the rule settled by this court, as above indicated. Possibly I may be wrong, but I cannot escape the conviction that if the injury in question was the result of negligence on the part of any one, then it was such negligence, as was suggested by the plaintiff's counsel, on the part of the foreman; or, if not him, then the man who had been working with the plaintiff, or the brakeman, or the gang-boss, who seems to have had the immediate charge of the repairing; for there is no evidence that any other person con-

nected with the company had any knowledge or information that any such repairing was to be done on the car and at the place in question, much less that the plaintiff was about to do, or in the act of doing, such repairing. For an injury resulting from the negligence of any of those persons, it seems to me, the plaintiff is not entitled to recover, by reason of the rule settled by this court, as above indicated. Nor am I able to find any fact or circumstance in the case which brings it within any established exception to that rule. I find no admission in the answer which, taken together, as it should be, can in any way aid the plaintiff. A party seeking to recover on the ground of negligence, certainly has the burden of proving it. A specific disclaimer of negligence does not, as it seems to me, cast upon the party disclaiming the burden of proving due care or the absence of negligence. A presumption of negligence should not be indulged from an injury which may have been the result of a mere accident. Kelley *v.* C., M. & St. P. Ry. Co., 53 Wis. 74; s. c., 5 Am. & Eng. R. R. Cas. 469. Such being the recognized rules of law, I am unable to find anything in the case here from which an absolute or prima facie liability may be predicated, upon the mere fact that the plaintiff, in pursuance of an order from the foreman, and immediate direction of the gang-boss, went under a car standing upon an unlocked side track, where other cars were liable to go, and did go, and cause the injury.

Taylor, J. I concur in the above opinion of Justice Cassoday.

PENNSYLVANIA R. R. CO.

v.

WACHTER.

(60 *Maryland Reports*, 395.)

W. employed as a repairman by the Pennsylvania R. R. Co., while proceeding down the track on a hand car, on a very foggy morning to surface up the track, was run into by an extra train coming in an opposite direction, at a rapid speed, and without any previous warning, and was permanently injured by the collision. It was the practice of the company, of which W. had knowledge, to run extra trains without previous notice. In an action against the railroad company by W. to recover damages for the injuries he had sustained, it was *held:*

1st. That when W. entered the service of the defendant as a repairman on its road, he took upon himself the natural and ordinary risks belonging to such service.

2nd. That if, with the knowledge that the defendant in the management of its road, was in the habit of running extra trains without notice, and that

it was his duty as one of the repairmen to be always on the look-out for danger from that source, he continued to remain in the defendant's service, he must be considered as having assumed the risk to which he was thereby exposed, and having been injured in consequence thereof, he could not recover damages of the defendant.

Where through the fault of persons in charge of a train, the head-light is not exposed in front of the engine in foggy weather, as expressly required by a rule of the railroad company, the company is not responsible for the negligence of such persons, unless it failed to exercise proper care in their selection, or retained them in its service with knowledge of their incompetency.

APPEAL from the Circuit Court for Frederick County.

This suit was brought to recover damages for personal injuries sustained by the appellee by being run into by an engine of the appellant. The case is stated in the opinion of the court. The jury rendered a verdict for the plaintiff, for $4416, and judgment was entered accordingly. The defendant appealed.

The following are the prayers of the plaintiff, referred to in the opinion of the court:

2. That if, under the pleadings and evidence, the jury shall find that the plaintiff, at the time of the injury complained of, if the jury shall find such injury, was in the employ of the defendant, and that said injury was occasioned by the negligence of the defendant in failing to exercise ordinary care and prudence for the protection of the plaintiff and its other employés, in providing reasonable rules and regulations for the government of its agents and employés in the running and management of trains and engines passing over its said road, to give notice to its employés who are required, in the discharge of their duties, to be on and about its railroad track, of approaching trains or engines, and that said injury was the direct result of such negligence and want of ordinary care and prudence on the part of the defendant, and did not result from the want of ordinary care and prudence on the part of the plaintiff, directly contributing to such injury, that then the plaintiff is entitled to recover.

7. That defendant is liable in this action, if the jury shall find that the injury was caused by the negligence of defendant's employés; if the jury shall find that defendant could have made plaintiff's labor less hazardous and more safe, had its rules prescribed that notice of all special or extra trains or engines passing over its track, should be sent out in advance, so far as the same was practicable, and that such a rule would have prevented the injury complained of; provided, that the jury shall find such a rule was required by a reasonable regard for the safety of life and limb of those employed in its service, and was consistent with an efficient working of its road.

James McSherry for the appellant.

Wm. P. Maulsby, Jr., and Milton G. Urner for the appellee.

ROBINSON, J.—We do not see on what grounds this action can be maintained. The appellee was at the time of the accident, and had been for at least eighteen months prior thereto, in the employment of the appellant. On the morning of the 16th of October, 1879, after having performed some work near Woodsborough, he, in company with Eyler, the foreman of the gang, and other repairmen who worked on that section of the appellant's road, proceeded down the track in a hand-car, to surface up the track, when they were run into by an extra train, coming in an opposite direction, which threw the hand-car from the track, and thereby injured the appellee. The engine approached at a rapid speed, and without any previous warning. The morning was very foggy, so much so that one could hardly see the engine at a distance of forty yards.

Rule 386, in the book of rules adopted by the company, provides:

"That extra trains may pass over the road at any time, without previous notice, and foremen must always be prepared for them."

Eyler, the foreman, who was examined as a witness for the appellee, says he was supplied with the book of rules and knew of rule 386; that he loaned the book one day to the appellee; that witness had, from time to time, cautioned men to be on the look-out for extra trains passing over the road without previous notice.

The appellee, himself a witness, admits he had seen extra trains pass over the road without previous notice to any one; that he knew it was his duty to be always on the look-out for such trains; that the position of the men on the hand-car at the time of the accident, facing up and down the road in opposite directions, was to be on the look-out for danger in either direction, and that extra trains, running without previous notice, was one of these dangers.

Upon such proof as this, there ought not to be any difficulty in regard to the rules of law by which the rights and obligations of the parties are to be determined. When the appellee entered the service of the appellant as a repairman on its road, he took upon himself the natural and ordinary risks belonging to such service. And further than this, if he knew the appellant, in accordance with the rules adopted for the running of its trains and in the management of its road, was in the habit of running extra trains without notice, and that it was his duty, as one of the repairmen, to be always on the look-out for danger from that source, and with this knowledge continued to remain in the appellant's service, he must be considered as having assumed the risk to which he was thereby exposed.

Now the proof shows that one of the rules adopted by the appellant in the management of its road, provided that extra trains "may pass over the road at any time without previous notice." Whether the appellee himself had read this rule, or whether it had been read to him by Eyler, the foreman, is not material. He

admits he knew it was the practice of the company to run such trains without previous notice; that it was his duty to be always on the look-out for danger to which he was thereby exposed; that with this knowledge he continued to remain in the appellant's service, and that the position of the men on the hand-car at the time of the accident was for the purpose of avoiding danger from this and other sources.

If this be so, it cannot be said that the mere running of the extra train without previous notice was negligence on the part of the company entitling the appellee to recover.

The appellant, it is true, had no right to expose the appellee to risks not ordinarily incident to his employment as a repairman, and which, by ordinary care on its part, might have been avoided. But it had the right to prescribe rules in regard to the management and running of extra trains, and if the appellee with full knowledge of the running of such trains, and of the danger to which he was thereby exposed, voluntarily continued to remain in the appellant's service, he has no right to say a better and safer rule might and ought to have been adopted. On the contrary by thus remaining in a service which necessarily exposed him to hazardous risks, from causes open and obvious, the dangerous character of which he knew, or had every opportunity of knowing, he must be considered as having assumed such risks, and if injured in consequence thereof, he must abide the consequences, so far as any claim upon the company is concerned. Stricker's Case, 51 Md. 47; Woodward's Case, 41 Md. 298; Wonder's Case, 32 Md. 420; Woody v. Railway Co., L. R. 2 Ex. Div. 389.

The second and seventh prayers of the plaintiff granted by the court, were therefore clearly erroneous. These instructions are based on the theory, that there was a duty or obligation resting on the appellant requiring previous notice to be given to the appellee and other employees of the running of extra trains, provided this could be done consistently with the efficient working of its road. Whatever merit there may be in the proposition of law thus announced, it is not applicable to this case, in which the appellee admits he continued in the service of the company with knowledge of the danger to which he was exposed by the running of such trains.

What other acts of negligence are then relied on in support of this action? There was negligence, it was argued, in not adopting rules, requiring the whistle to be sounded at all public and private crossings at grade. Now the rule of the company in this respect, requires the engine bell to be rung from a point one-quarter of a mile from every road crossing, until the road crossing is passed, and "the whistle to be sounded at all road crossings at grade, where whistling post are placed." But in reply to this, it is said there are no whistling posts on this branch of the road. If this be so, it

was known to the appellee, and with this knowledge he remained in the appellant's service, without complaint on his part of the danger to which he was thereby exposed.

In addition to this rule, the appellant also required in running extra trains, that the whistle should be sounded frequently; and one might suppose that such a rule as this would afford equal, if not greater, security to repairmen scattered along the road, than a rule merely requiring the whistle to be sounded at the crossings, and which is intended for persons travelling across the road. Be this as it may, we rest our opinion on this branch of the case, upon the fact that the appellee continued in the employment of the company, knowing that there were no whistling posts at the crossings, and by so doing he assumed the risks to which he was thus exposed, and must be presumed to have acquiesced in the rules adopted by the appellant in the management of its road.

Then again, it was argued that the morning was very foggy, and the head-light was not exposed in front of the engine. This, however, was the fault of the persons in charge of the train; for the rules of the company expressly require the head-light to be exposed in foggy weather, and for the negligence of such persons the company is not responsible, unless it failed to exercise proper care in the selection of such persons or retained them in its service, with knowledge of their incompetency. There is no evidence to show the appellant did not exercise proper care in the selection of skilful persons in charge of the engine, and the court below so instructed the jury, to which the appellee did not except. We must therefore consider it a concession in the case.

The evidence does show, however, beyond question, that the appellee was crippled for life, while faithfully performing his duty in the service of the appellant, and we have been studious, if it be proper so to speak judicially, to find some evidence upon which the question of negligence could be submitted to the jury. But however much his unfortunate condition may appeal to the charity and humanity of his employers, we have not been able to find any evidence, upon which according to the well settled rules of law, this action can be maintained. We are compelled therefore to reverse the judgment, without awarding a new trial.

Judgment reversed, without awarding a new trial.

Risk of Employment.—Where a servant of a railroad company has knowledge of the manner and of the regulations under which trains are run, he is taken to run all the risks of his employment resulting therefrom. Wright *v.* New York Central R. Co., 25 N. Y. 562; Haskin *v.* New York, etc., R. Co., 56 N. Y. 608.

Generally a railroad company is bound as to its servants to make and enforce reasonable rules and regulations for the running of its trains and will be held liable for a failure so to do.—Chicago, etc., R. Co. *v.* Taylor, 69 Ill. 461; Cooper *v.* Iowa Central R. Co., 44 Iowa, 134; Pittsburgh, Ft. W. & C. R. Co. *v.* Powers, 74 Ill. 341; Chicago, B. & Q. R. Co. *v.* McLallen, 24 Ill. 109;

Kansas Pacific R. Co. v. Salmon, 14 Kans. 512; Baltimore & Ohio R. Co. v. Woodward, 41 Md. 268; Rose v. Boston & Albany R. Co., 58 N. Y. 217; Besel v. New York Central & H. R. R. Co., 70 N. Y. 171; Vose v. Lancashire & Y. R. Co., 2 Hurl. & N. 723; Slater v. Jewett, 5 Am. & Eng. R. R. Cas. 515; Lake Shore, etc., R. Co. v. Lavalley, 5 Am. & Eng. R. R. Cas. 549; Sheehan v. New York, etc., R. Co., 12 Am. & Eng. R. R. Cas. 235.

WILSON
v.
DENVER, S. P. AND P. R. CO.

(*Advance Case, Colorado. December* 14, 1883.)

Railroad companies are bound as to their servants to keep the track free from such obstructions as are dangerous to life.

Where in an action by a servant against a railroad company to recover damages for a personal injury, the same is alleged to have been caused by an obstruction which was on the track through the negligence of the company, without negligence on the part of the plaintiff, such allegations constitute prima facie a case of liability on the part of the railroad company.

ERROR to District Court of Arapahoe county.
Brown & Putnam for plaintiff in error.
Orahood & Teller for defendants in error.

BECK, C. J.—The amended complaint in this case was held insufficient, upon demurrer, in the district court, and the plaintiffs declining to amend further, judgment was given for the defendant, the said railroad company. The complaint charges that the accident which is the ground of the action occurred by reason of the engine on defendant's railroad coming in contact with a log lying across and upon the track of said railroad at or near Deansbury station, whereby the engine was thrown from the track into the river adjacent, and the deceased thereby instantly killed. It alleges that the deceased was in the employ of the railroad company as a fireman upon said engine, but at the time of the accident, by request of the engineer, he was running the engine, and was doing so with due care and skill; that the accident occurred while the deceased was in the discharge of his duty, and that it did not occur by reason of any want of skill or care on the part of the engineer in charge of the engine, or of the deceased, but on account of the negligence of the defendant, alleging in this connection "that said log was on and across said track by reason of the negligence of the defendant." The complaint then alleges that a fire had been raging for the space of twenty-four hours immediately preceding the accident, in a dense growth of pine timber on either side of the

track, near the scene of the accident; and that several hours before the accident defendant was notified of the fire; and that in consequence thereof trees were liable to fall upon and obstruct the track; but that the defendant neglected to take any precautions to give notice of danger, or to remove obstructions; and that the accident occurred in consequence of said negligence of the defendant and not otherwise.

It is not alleged specifically that the log got upon the track by reason of the fire, and in this particular the complaint is imperfect and liable to criticism. We are of opinion, however, that this defect was not properly reached by the demurrer. A demurrer admits all facts well pleaded, and there are sufficient facts well pleaded in this complaint to constitute a cause of action, and to require an answer from the defendant. The allegations of the employment of the deceased by the defendant; that at the time of the accident he was in the discharge of his duty; that the accident did not occur by reason of negligence or want of care or skill on part of either the engineer in charge of the engine, or of the deceased; but that it did occur in consequence of the negligence of the defendant in failing to keep its track free from obstruction at the point mentioned,—are statements of facts which present an issue. Such issue cannot be met by a demurrer; certainly not by the demurrer filed herein, the grounds of which are substantially as follows:

(1) That deceased was out of the line of his duty as fireman, without the knowledge or consent of the defendant, at the time of the accident.

(2) It is not alleged that any officer or agent of the defendant, whose duty it was to look after the railroad and guard against obstructions, was notified of any danger from falling timber at the place where the accident occurred.

(3) The complaint shows that defendant did not have notice of any danger likely to arise from falling timber.

(4) The complaint does not state facts sufficient to constitute a cause of action.

Courts have held, where negligence has been alleged in general terms, that while the pleading is not for this cause obnoxious to a demurrer, yet if the plaintiff possesses more specific information, he may be required on motion to make his complaint more definite and certain. Filts *v.* Waldeck, 51 Wis. 569; Hayden *v.* Anderson, 17 Iowa, 162; O. & M. R. Co. *v.* Callann, 73 Ind. 265; Ry. Co. *v.* Lavalley, 36 Ohio St. 225; s. c. 5 Am. & Eng. R. R. Cas. 549. It is a duty which railroad companies owe to their employees to keep the tracks of their railways free from obstructions that would endanger the lives of the latter. This duty is not absolute, but has its limitations, which are clearly stated by Mr. Justice Elbert in Colo-

rado Cent. R. Co. *v.* Ogden, 3 Col. 510. The learned judge says: "The company must use all reasonable precautions and care to secure the safety of its employees by keeping the roadway in repair. It cannot through want of watchfulness expose them to unreasonable risks in this respect and escape liability, but the duty imposed is that of ordinary care. This ordinary care must be measured by the danger of the service and proportioned to it. Considering the dangerous force which a railway company puts in motion, the term 'ordinary care towards its employees' imposes without doubt a high degree of diligence in keeping the road and all its appliances in perfect repair, but it neither warrants nor insures against defects."

While the mere fact that an injury to an employee was occasioned by an obstruction of the track, does not make out a prima facie case of liability against the railroad company, yet, when, as in the present instance, it is further alleged that the obstruction was upon the track by reason of the negligence of the company, and that the employee was in discharge of his duty, and exercising due care and skill, at the time the injury was received, such allegations do constitute, prima facie, a case of liability against the railroad company. The late Chief Justice Breese, in commenting upon the liabilities of railroad companies to their employees, upon a review of authorities, said: "The result of which rulings is not to hold those companies as insurers that their road and appurtenances and instrumentalites are safe and in good condition, but that they must do all that human care and vigilance and foresight can reasonably do, consistent with the modes of conveyance and the practical operation of the road, to put them in that condition and to keep them so. . . . On the other hand, they are not answerable for latent defects in material employed in the construction of their machinery which the usual and well-recognized tests of science and art afford for the purpose, but fail to detect; nor are they liable for accidents occurring by which injury ensues, when skill and experience are not able to foresee and avoid them. T. P. & W. Ry. Co. *v.* Conroy, 68 Ill. 567, 568."

One of the principal objections urged in this court to the complaint is that the charge of negligence made against the railway company is not sufficient to admit proof of facts fixing the liability of the defendant, for the reason that it is not alleged that notice of the danger to be apprehended was given to the person or officer whose duty it was to oversee and provide against obstructions. This position is not maintainable. The charge of negligence is made directly against the defendant, and the effect of the demurrer is to admit that the obstruction which caused the death of the deceased was upon the track by reason of the defendant's negligence.

In Hildebrand *v.* Toledo, etc., Ry. Co., 47 Ind. 406, the court says: "The counsel on both sides have filed long, able, and searching briefs. The brief on behalf of the appellee is chiefly confined to the question of the liability of the company for the negligence of its servants, by which a co-servant was injured or killed; but we think this is not the case made by the first and third paragraphs of the complaint, as they directly charge negligence against the defendant itself. This is admitted by the demurrer; and we think that no authority can be found where negligence has been directly charged against the defendant, that a demurrer for want of sufficient facts has been sustained. How this charge may be avoided by an answer, on the evidence, is not before us, but only as to whether these paragraphs of the complaint, all allegations therein being admitted by the demurrer, required an answer. We hold that these paragraphs of the complaint required an answer."

In 2 Thomp. Neg. 1246, it is said that negligence on the part of the defendant is the gist of the action, and must be charged in the plaintiff's petition, but that an allegation specifying the act constituting the injury, and alleging that it was negligently and carelessly done, is sufficient. See, also, pages 1248 and 1254, id., and Grinde *v.* M. & St. P. R. Co., 42 Iowa, 376.

It is clear from the principles announced and authorities cited that the following further objections to the complaint, made by counsel for defendant in error, are not available under this demurrer, viz.: That sufficient time had not elapsed after notice of the fire for defendant to have provided a guard at that place, either to give notice of danger or remove obstruction; that it does not show how long such obstruction had been on the track; or that defendant knew or ought to have known that it was on the track; that it does not allege when such notice was had upon the defendant, nor upon what officer or agent of the company, nor how the tree got upon the track.

Chief Justice Breese in T. P. & W. Ry. Co. *v.* Conroy, 68 Ill. 569, in speaking of the strong obligation resting on railroad companies to use all reasonable means to acquire knowledge of the condition of their roads, says: "The law will not allow them to be out of repair an hour longer than the highest degree of diligence requires; and further, it is their duty to keep a sufficient force at command, and of capacity sufficient to discover defects and apply the remedy. Neglecting to keep it in the best condition, if injury occur thereby, the companies will be liable, and they ought to be so liable. From this responsibility they cannot be relieved, except by showing that the defect was one which could not be discovered or remedied by any reasonable skill or foresight."

Such is the state of the law upon pleadings of this character, and we must hold that, as against the demurrer filed, the complaint is

sufficient. The defendant may have a perfect defense to the action, but if so, the parts constituting such defense must be pleaded.

The judgment is reversed, and the cause remanded.

Obstructions.—A railroad company is usually bound as to its servants to exercise care to keep the track free from all obstructions dangerous in their nature. Illinois Central R. Co. *v.* Welch, 52 Ill. 183; Chicago, B. & Q. R. Co. *v.* Gregory, 58 Ill. 272; Chicago & I. R. Co, *v.* Russell, 91 Ill. 298; Fifield *v.* Northern R. Co., 42 N. H. 225; Dorsey *v.* Phillips & C. Const. Co., 42 Wisc. 583.

See Central R. Co. *v.* Mitchell, 1 Am. & Eng. R. R. Cas. 145; Gates *v.* Southern Minn. R. Co., 2 Am. & Eng. R. R. Cas. 237; Lockwood *v.* Chicago & N. W. R. Co., 6 Am. & Eng. R. R. Cas. 157; Batteson *v* Chicago, etc., R. Co. 8 Am. & Eng. R. R. Cas. 123; Houston & T. C. R. Co. *v.* Powers, 8 Am. & Eng. R. R. Cas. 504; Durkin *v.* Sharp, 8 Am. & Eng. R. R. Cas. 520.

But as to the effect of a servant's knowledge of the existence of an obstruction see Lovejoy *v.* Boston & L. R. Co., 125 Mass. 79; Gibson *v.* Erie R. Co., 63 N. Y. 449.

MACKIN
v.
BOSTON AND ALBANY R. R.

(135 *Massachusetts Reports*, 201.)

If a railroad corporation is bound to use reasonable care in furnishing its employees with suitable cars, on which they are employed, this rule does not apply to a car received from another corporation, while in transit to its place of destination; but the only duty it owes its employees in such a case is that of providing suitable and competent inspectors.

An inspector of a railroad car and a brakeman employed on the car are fellow servants; and the latter cannot maintain an action against their common employer for an injury resulting from a failure of the former to perform his duty.

TORT, for personal injuries received by a brakeman, while in the defendant's employ.

At the trial in the Superior Court, before Rockwell, J., the plaintiff's evidence tended to show that on May 19, 1881, he was the rear brakeman on a train of freight cars which was at Brookline, about two miles from the freight yard of the defendant at Boston; that it was the plaintiff's duty to shackle certain cars, standing on a side track, to the train; that he did this, and then walked towards the rear of the train, and, after the train started, attempted to get on the rear car by means of a ladder at its forward end; that, before taking hold of the ladder, he noticed that the lower round was gone; that he then took hold of the round next above, and attempted to draw himself up, but before he got

hold of another round with his other hand, the round he had hold of gave way, and he was thrown to the track and received the injuries complained of; that the ladder was made of separate irons, the ends of which were screwed to the car, and the part between projected from the face of the car, so that it could be grasped by the hand, or afford a resting-place for the foot; that the plaintiff at the time of the accident was properly ascending the ladder in the discharge of his duty; that, after the accident, the place where the iron had been was examined, and it was found that the screw was gone, the screw-hole was twice as large as it should be, and the wood was decayed. Two witnesses testified that the car looked like an old car, and one of them that it had the appearance of a very old car.

There was no evidence, nor did the plaintiff contend, that the car was not originally constructed of proper materials. It went to Brookline from Boston, over a branch of the defendant's road, loaded with flour, and was empty at the time of the accident, and was about to be drawn back to Boston under the defendant's management.

The plaintiff testified that he was aware, while in the employ of the defendant, that many freight cars came upon the road which were not owned by the defendant, and that, in the ordinary course of business, many such foreign cars were drawn over the road as part of the defendant's freight trains.

The defendant put in evidence tending to show the following facts: The car in question was not owned by the defendant, but by the Merchants' Despatch Transportation Company, a stock company or association owning a large number of freight cars, which go into all parts of the country. It came upon the defendant's road at East Albany (otherwise called Greenbush), New York, from the West, and left there for Boston on May 10, 1881, and left Boston for Brookline on May 13th. Throughout the month of May, 1881, as well as before and since, the defendant had a sufficient force of competent and suitable inspectors and repairers at East Albany, whose duty it was to inspect every freight car which arrived there from the West, and to cause every defective car to be repaired before it left the station to go eastward. These inspectors were on duty when the car in question reached East Albany, and while it remained there. A like force of inspectors was, during that month, as well as before and since, maintained by the defendant, and each of the following stations on its road, namely, Pittsfield, Springfield, Worcester, and Boston; and their duty was to inspect every car which arrived at their respective station, and see that every defective car was repaired before it left the station; at each of the places and stations above named, abundant and suitable materials and means for making repairs on cars were provided. All these inspectors and repairers were on duty,

under the supervision of competent and suitable formen, hired for the purpose, when the car arrived and remained at each of the stations named, and when it left such station. These employees of the defendant were selected for the work on account of their proved fitness for it; and, if they all did their duty, no car passed either station without proper inspection, nor without first receiving all the repairs which such inspection showed that it needed.

It was shown that from two hundred to five hundred cars passed Albany going eastward on the defendant's road daily, and on one day there were seven hundred and fifty.

The car was repaired at Boston the day after the accident; and the man who repaired it testified that all it needed was the putting on of one iron and the tightening of one or two screws. He did not remember whether the iron was fastened by him in the place whence it had pulled out, or was moved to a new place. He testified that the ends of the iron, through a hole in the middle of which the screw—a half-inch screw—passed, were as large as a half-dollar. He added, "It is my impression that the hole was not solid."

The defendant's business has been for years such as to require that the defendant should draw over its road large numbers of cars owned by others, and coming from all parts of the West; and more than half the freight cars drawn over its road, while the plaintiff was employed by it, were such foreign cars, it being necessary in the through business, as it is called, that merchandise from the Western States should be carried from its starting-point to its destination without change of cars.

The defendant asked the judge to order a verdict for the defendant, because there was no evidence of negligence on the part of the defendant, and because the negligence, if any, was that of a fellow servant or servants of the plaintiff. The judge refused so to rule.

The defendant then asked the judge to instruct the jury as follows:

"1. If the defendant provided a suitable number of competent persons to inspect all cars which arrived at Albany, Pittsfield, Springfield, Worcester and Boston, and they were so employed from the time when this car was received at Albany till it left Boston for Brookline, and if suitable provisions were made at these places for repairs, the defect in the cars was not the result of negligence on the part of the defendant, and the verdict must be for the defendant. 2. If the defendant provided a suitable number of competent persons to inspect all cars which arrived at Boston, and to make needed repairs, and they were so employed at the time of the arrival of this car, the defect in the car did not result from negligence of the defendant, and the plaintiff cannot recover. 3. If the defendant made suitable provision for the in-

spection and repair of cars, and the accident was owing to a defect which existed by reason of the negligence of these inspectors, or any of them, the defendant is not liable. 4. If the only negligence was on the part of the inspectors employed by the defendant, and the defendant had used reasonable and due care in the appointment of these inspectors in suitable numbers, the plaintiff cannot recover."

The judge declined to give any of the instructions asked for, and instructed the jury on these points as follows:

"It was the duty of the defendant corporation to take care of the car as if it had been its own. Was the defendant negligent, or was it in the exercise of due care, in regard to this car? If the defendant took reasonable care in receiving this car into its use; if it employed suitable inspectors, and sufficient in number and in skill; if the car was thoroughly inspected; if those inspectors had it in their power to call in the aid of suitable repairers, with proper materials and means of repair; if, whenever there was a defect, that defect was repaired and removed; if there was no negligence on the part of the inspectors, no want of skill, and every duty was fully and faithfully done,—then the corporation can contend that it had used all the means of safety in regard to this car which the law requires it to do. If you find that the plaintiff was in the exercise of due care, he may recover if the defendant was negligent. If you are satisfied that the defendant did use reasonable care throughout, in regard to this car,—in using it on its road, in providing competent and faithful inspectors and skilled repairers, always ready to make repairs, and provided always with suitable materials for those repairs whenever needed, and that these employees had done their duty,—the jury are authorized to find for the defendant."

The jury returned a verdict for the plaintiff in the sum of $7000; and the defendant alleged exceptions to the refusals to rule and to the instructions given, so far as they were inconsistent with the instructions asked for.

A. L. Soule, for the defendant, cited Smith *v.* Potter, 46 Mich. 258; Columbus & Xenia R. R. *v.* Webb, 12 Ohio St. 475.

S. B. Allen, (W. B. Allen with him,) for the plaintiff, cited Schopman *v.* Boston & Worcester R. R., 9 Cush. 24; Fletcher *v.* Boston & Maine R. R., 1 Allen, 9; Jones *v.* New York Central & Hudson River R. R., 28 Hun. 364, and 92 N. Y. 628; King *v.* Ohio R. R., 8 Am. & Eng. R. R. Cas. 119.

Allen, C. J.—Even if the car in question is treated as a car of the defendant, furnished by it for its local business between Boston and Brookline, the instructions given to the jury seem to us to hold the defendant to a higher degree of responsibility than the law imposes upon it. The words, "if, whenever there was a defect,

that defect was repaired and removed," when taken in the connection in which they occur, virtually required the defendant to warrant the perfect condition of the car. This is in excess of the rule, as recently declared in Holden v. Fitchburg R. R., 129 Mass. 268, Am. & Eng. R. R. Cas. 94, where the duty of a master, in respect to those things which he is bound to furnish and keep in good condition, is held to be that of using reasonable care.

In the present case, however, it appears that the car was not owned by the defendant, but came from the West, and was received upon the defendant's road at its western terminus at Greenbush, and was drawn to Boston, and thence to Brookline; and it is contended by the defendant, as the true construction of the bill of exceptions, that the destination of the car when received was Brookline, and that the defendant did not use it in the local business of the corporation, but merely drew it to its original destination, and unloaded it, and was about to draw it back to Boston, to be in readiness for its return to the West. These latter facts are not stated in express terms, but, if true, (although perhaps the mere ownership is not material,) a car or so received, while in transit to its destination, and until ready for such inspection as would be suitable and necessary in preparation for its return, would not come within the rule applicable to machinery and appliances furnished by the defendant. According to the course of business, well known to the plaintiff, and notorious, the defendant was in the habit of receiving many such cars daily, and drawing them over its road as a part of its freight trains. Even in the absence of any statute, or special contract, regulating the terms of receiving and drawing such cars, the defendant was bound, as a common carrier, to receive and draw them. Vermont & Massachusetts R. R. v. Fitchburg R. R., 14 Allen, 462, 469. The obligation of drawing cars over its road would not extend to such as were in an unsafe condition; but, as to cars so received, the duty of the defendant is not that of furnishing proper instrumentalities for service, but of inspection, and this duty is performed by the employment of sufficient, competent and suitable inspectors, who are to act under proper superintendence, rules and instructions; and, however it may be as to other cars, the inspectors must be deemed to be engaged in a common employment with the brakemen as to such cars, while in transit, and until ready to be inspected for a new service.

Exceptions sustained.

Inspection of Machinery.—The company ordinarily owes to its servants the duty of causing its machinery and apparatus to be inspected by competent persons at reasonable intervals.

Harrison v. Central R. Co., 2 Vroom (N. J.), 293; McDermott v. Pacific R. Co., 30 Mo. 115; Falkner v. Erie R. Co., 49 Barb. 324; Warner v. Erie R. Co., 39 N. Y. 468; Toledo P. & W. R. Co. v. Conroy, 68 Ill. 560; Shanny v. Androscoggin Mills, 66 Me. 420; Solomon R. R. Co. v. Jones and note, infra, with cases cited.

As to the duty upon the part of the company to provide for the inspection of cars received by it from other lines, see Ballou *v.* Chicago, etc., R. Co., 5 Am. & Eng. R. R. Cas. 480.

Fellow Servants.—A track inspector and a servant of the company employed upon its trains are accounted fellow servants; and the company will accordingly not be liable for an injury to the latter occasioned by the carelessness of the former. Coon *v.* Syracuse, etc., R. R. Co., 5 N. Y. 492.

The same principle applies as between a car inspector and a servant employed on a railroad train. Smith *v.* Potter, 2 Am. & Eng. R. R. Cas. 140; Nashville, etc., R. R. Co. *v.* Foster, 11 Am. & Eng. R. R. Cas. 180.

SOLOMON R. R. CO.

v.

JONES.

(*Advance Case, Kansas.* 1883.)

Where a railroad corporation is formed the construction of the road will, in the absence of any showing to the contrary, be presumed to be done by the corporation, and it will be responsible for injuries resulting from negligence in such construction.

Where a president of a corporation appears as the active agent in the execution of any work, parties employed by him have a right to assume that he is acting for the corporation, and that his acts in that respect are its acts and binding upon it.

Where a railroad corporation enters into a written contract for the entire construction of its road, and immediately thereafter such contract is by the contractor assigned to the president of the corporation, who proceeds to construct the road, and the fact of this contract is not made public, and the employees have no notice of its existence, but are simply employed to do work, and in the course of such work one is injured through negligence for which the employer is responsible: *held*, that such employee can recover from the corporation for such injuries.

It is the duty of a master not only in the first instance to make reasonable efforts to supply to his employees safe and suitable machinery, tools, etc., but also thereafter to make like efforts to keep such machinery, etc., in safe and serviceable condition; and to that end must make all needed inspections and examinations.

Where two hand-cars collide and the patent injuries to one of them are serious and such as to indicate great violence in the collision, it is the duty of the railroad corporation to make a reasonable examination and inspection of the injured car to see if there be no latent injuries.

What is a reasonable examination and inspection, and to what parts of the car it must be specially directed, will depend upon the particular circumstances of each case, and presents generally a question of fact for a jury.

A verified petition filed in one case by a party is competent evidence against such party on the trial of another case as a statement or admission, but is not conclusive and carries nothing of estoppel.

Notwithstanding the statute now provides that every railroad company shall be liable for all damages done to any employee in consequence of any negligence of its agents, or by any mismanagement of its engineers or other

employees; the knowledge or notice, act or omission for which the company is responsible must be that of some agent or employee having authority or duty in the premises.

J. P. Usher for plaintiff in error.
A. H. Ellis for defendant in error.

BREWER, J.—This was an action brought by defendant in error, plaintiff below, to recover damages for personal injuries received as alleged while in the employ of defendant. The facts are, that on November 19, 1879, plaintiff was employed in surfacing the track on the line of defendant's railroad. On the morning of that day he started from Beloit in a hand-car with other laborers. He was working the handle of the car, and after going a short distance the handle broke, in consequence of which he fell out in front of the car and was run over and injured. The case came on for trial in December, 1881, before a jury and resulted in a verdict and judgment for plaintiff in the sum of $4250. The entire testimony was preserved and the whole case is before us for review. We shall notice only three questions, they being the only ones of sufficient importance to require examination.

1. Was the verdict against the evidence, and in this plaintiff in error asserts two propositions. One, that the relation of employer and employee is not shown to have existed between defendant and plaintiff, and therefore the defendant was in no wise responsible for what took place. The other, that the testimony does not warrant a finding of negligence against any one.

2. Did the court err in admitting a certified copy of a petition in mandamus filed in this court?

3. Did the court err in the 7th instruction given at its own instance? Of these in their order.

Did the testimony warrant a finding that the relation of employer and employee existed between the parties so as to render the company liable for any negligence in causing the injuries? This question must be answered in the affirmative. The claim of the railroad company is first that the road was constructed under a contract, and that the contractor and not it was responsible for any negligence in the construction. And second, that the road as constructed was on the 10th of November, nine days before the injury, turned over for operation to the Kansas Pacific Ry. Co., and that it and not the defendant was responsible for any negligence subsequent thereto. It appears that the company was organized in August, 1877. That D. M. Edgerton was the president and continued to occupy that office until some time after the injury complained of. He was also vice-president of the Kansas Pacific R. R. Co. On August 17, 1877, at a stockholders' meeting, the president was by resolution authorized to make all necessary arrangements and such contracts as he might deem best subject to the ap-

proval of the board of directors for the construction of the road from Solomon City to Beloit. In May, 1878, mortgage bonds to the amount of $10,000 per mile were authorized. J. P. Usher subscribed 20,000 shares of stock. Outside of this and one or two township and county subscriptions there were only 15 or 20 shares of stock issued, and these were paid for in services. On the 15th of May, 1878, there was executed a contract by Edgerton, the president, on behalf of the railroad company and J. P. Usher, by which the latter agreed to construct the road, and the company in payment therefor was to give its entire issue of mortgage bonds, all local aid voted or subscribed to the company, and credit said Usher with full payment of his subscription of 20,000 shares. This contract was by Usher formally assigned to Edgerton, the president. On July 1, 1879, at a meeting of the directors, the contract between the president and Usher and his assigns was ratified and confirmed, the contract and the assignment to Edgerton being fully entered on the minutes of this meeting. The records of the directors' meetings also show a resolution authorizing the president to operate the railroad of the company or to make any agreement or contract he may deem advisable with the receivers of the Kansas Pacific Ry. Co. and others for the operation of the road. Also another resolution thanking the president for his successful completion of the road. Also another resolution authorizing the president to receive from the county of Ottawa the bonds voted by it. Also another resolution that H. C. Clements be appointed agent to receive and receipt for all moneys due or to become due from the government of the United States for the transportation of mails, troops and supplies. These last two resolutions were of date September 30, 1879. These are all the matters that appear upon the records of the directors' or stockholders' meetings in reference to the constructing of the road, or the operation of the same or in reference to the contract with Usher and its assignment to Edgerton. Of course, an implication arises from the existence of the contract that the work was done by the contractor, but there are other facts to be considered. The plaintiff and other laborers testified that they were employed by the defendant. It is not pretended that the employees were notified of this contract, nor that its existence was in any manner made public. The ostensible and active agent was the president of the corporation. Some of the superintendents and principal men in the construction testified that they were in the employ of the Kansas Pacific Co., had no other employment, and were sent by it to take charge of the construction of this road. Some of the payments were in Kansas Pacific checks and some were made by Edgerton personally. There was no report to the company defendant of any arrangement made by the president with the Kansas Pacific for the construction or operation of the road and no approval by it of any such arrangement. A

separate time table for the road was issued, signed it is true by parties who were officers of the Kansas Pacific. There was testimony of some parties that the road was turned over to the Kansas Pacific on November 10, but no notice was given to the employees of a change of employers; and, while wages were reduced on the 10th, notice of this reduction was not given till the 1st of December. The company's resolution indicated that something was due and to become due from the government for the transportation of troops, mails, etc. It authorized the president to apply for and receive the county bonds due it. It congratulated him as president on the completion of the road. From these and some other minor matters it seems to us that the actual facts of the case were that the Kansas Pacific was the real builder and owner of this road; that for reasons not disclosed it caused the creation of the corporation defendant, and in its name built the road. But there are two good reasons why the jury were justified in holding the defendant as the party responsible in this matter.

1. Where a corporation is organized for the purpose of doing any work, the work will be presumed in the absence of any showing to the contrary to be done by it, and it will be held responsible for all that transpires. Especially is this true of a railroad corporation, for to it alone has the State given the privilege of exercising the right of eminent domain. And where the State grants a franchise of such importance, it has a right to assume for itself and all citizens that the party receiving the franchise is executing the work and responsible for all that is done in such execution. Indeed, without some authority from the State, it cannot transfer the franchise or divest itself of responsibility. So where all that is patent to the public is the franchise and the work done under it, the public has a right to treat the beneficiary of the franchise as responsible for the work. And again, where the president of a corporation appears as the active agent in the execution of a work, all parties employed by him have a right to assume that he is acting for the corporation, and that his acts are its acts and binding upon it. It is not to be presumed that he is an independent contractor. Perhaps a different rule might obtain in the case of a third party, one having no contractual relations with the work. As to that question, it will be time enough to consider it when it arises. Here the plaintiff stood in contractual relations to the work. Nothing was public save the franchise, the doing of the work and the active agency of the president in such work. The employees understood they were working for the company, and had a right to regard it as the principal and hold it responsible for payment of wages and negligence in the management of affairs.

Again, did the testimony warrant a finding of negligence? Here the facts are these: Three hand-cars were in use by a gang of from forty to fifty laborers, working under three foremen. No question

is made as to the sufficiency of the car in question up to November 18, the day before the injury complained of. On that day there was a collision between this car and one of the others. The collision was violent enough to shatter the lifting-handles of this car. How much other damage was done is not positively established. There was testimony that on the morning of the 19th some of the hands noticed a crack in one of the wheels, and also that the wheels wobbled a little as the car got to running. Plaintiff was not present on the 18th, and knew nothing of the collision. On the morning of the 19th the men, two foremen being present, put the two uninjured cars on the track and were going off to their work with them alone. But the other foreman, who seems to have been the head foreman, came down just at that time and told the men to take the injured car also. Plaintiff got on to the injured car and commenced working the lever handle. After going about a mile and a half he saw some mud on the track at a road crossing, and thinking it would require more motion to take the car over the mud, gave the handle a little jerk and it broke, and he fell out and was run over. The handle at the other end broke at the same time. Both brakes were within the iron rings or clasps, which some twelve or fourteen inches from each end circle the handle and connect it with arms running down to the machinery below. Now the contention of plaintiff is that at the collision the day before this lever handle was cracked, and that in consequence thereof it broke at the little extra effort made to pass the car over the mud; that the patent injury from the collision was so great that common prudence required the most careful examination for latent injuries before further use of the car, and none having been made the company was guilty of negligence. It is not claimed that the crack in the handle, if crack there was, was visible, the point of fracture being within the iron ring or clasp; but it is insisted that injury to the lever handle might naturally have been expected from such a collision, and therefore it should have been especially and carefully examined.

We think the claim of plaintiff must be sustained. It cannot be affirmed that negligence was proved, so that a verdict to the contrary would have had to be set aside as against the testimony. But there was a fair question of fact presented upon which a verdict either way could not be disturbed in this court. There was evidently a violent collision. The shattering of the lifting handles disclosed this. The conduct of the men in leaving this car and attempting to start with only the others, is very suggestive as to the quantity of injury as well as to the fears of the employees. It will not be doubted that the duty of the company is not only in the first instance to make reasonable efforts to supply machinery, tools, etc., safe and sufficient; but, also to make like efforts to keep such machinery, etc., in good condition, and to this end must make all

reasonable and necessary inspections and examinations. Braun v. C., R. I. & P. R. R. Co., 53 Ia. 595; Greenleaf v. I. C. R. R. Co., 29 Ia. 14; Buzzell v. Lacoma Manufacturing Co., 48 Me. 113; Shanny v. Androscoggin Mills, 66 Me. 420; Snow v. Housatonic R. R. Co., 8 Allen, 441; s. c., 13 Allen, 433; Ford v. Fitchburgh R. R. Co., 110 Mass. 241; C. & N. W. R. R. Co. v. Jackson, 55 Ill. 492; Brabbets v. C. & N. W. R. R. Co., 38 Wis. 298; Porter v. Hannibal & St. J. R. R. Co., 71 Mo. 66; Laning v. N. Y. C. R. R. Co., 49 N. Y. 521; Pierce on Railroads, 365. We conclude, therefore, that upon neither ground can it be held that the verdict was against the evidence.

Did the court err in admitting a certified copy of a petition in mandamus filed by defendant in this court? The only objections made in the district court were those of irrelevancy and incompetency. The objections were not well taken. While an allegation in a verified petition in another case is not an estoppel and does not conclude the party making it, and so the court instructed, it is competent evidence against him, just as a declaration or admission made by him in any other manner and place.

The only remaining question arises on the seventh instruction. That reads as follows: "On the other hand, if you should believe from the evidence that the handle or lever of the hand-car was injured and unfit for the purpose it was used for, and that the fellow-servants of plaintiff knew of such defect or injury, or could have discovered it by the exercise of reasonable and ordinary care, then you should find for plaintiff, provided you should further believe he was in the employ of defendant."

In order to appreciate the question arising upon this instruction, it must be borne in mind that there were some forty to fifty laborers using these hand-cars, and that they were under the direction of three foremen. These foremen and laborers were all the employees of the defendant shown to have any use or knowledge of these cars during the 18th and 19th of November. Some of the laborers testified to knowledge of the collision, the injury to the lifting handles and the unsteady motion of the car. And from the testimony it might fairly be inferred that most of the laborers were fully aware of such collision and injury. Now the language of this instruction is general. If "the fellow-servants of plaintiff" knew or could have discovered. No distinction is made as to the employment or duties of those for whose knowledge or means of knowledge the company is responsible. Doubtless the act of 1874, Comp. Laws, 1879, p. 784, sec. 29, has changed the rule of liability for the negligence of employees, and has made the company liable to one employee for injuries caused by the negligence of a co-employee. But negligence implies omission of duty. Where there is no duty to act there is no negligence in failing to act. And the same is true where there is no power or authority to act. So where knowl-

edge or notice is brought home to an agent who has no duty or authority in the premises, the corporation cannot be charged with such knowledge or notice or held liable for negligence in failing to act thereon. Take this illustration: Suppose the attorney of the corporation is informed of a defect in a hand-car. He has nothing to do with the use, control or repair of the car. He has no duty or authority in the premises. The corporation cannot be charged with the knowledge he possesses or be held guilty of negligence for failing to act thereon. In short, each agent of a corporation has certain duties and authority. Within their scope his acts are those of the corporation; his knowledge that of the corporation; it is responsible for his acts and omissions. Under the old law only strangers could as a rule invoke the benefit of this and hold the corporation for such acts and omissions of the agent. The purport of this statute is to give to employees the same rights in this respect as strangers. We express no opinion on the question as to the measure of liability, nor do we decide whether it is the same in case of an employee as in that of a passenger. Hunt *v.* Railway Co., 26 Iowa, 363. It is enough to hold that it gives to an employee the same as to a stranger the right to hold the company responsible for the acts of agents or employees. It does not give them greater rights or make the corporation responsible to them for the acts and conduct of agents and employees outside the scope of their duties, or chargeable with the knowledge of or notice to employees in such matters. So that this instruction is faulty in placing no limit or qualification on the general language "the fellow-servants of plaintiff." And we are constrained to think the error material. The evident import, the natural construction of the language is, that if any of these forty or fifty laborers or any other employee knew or had means of knowledge the company was liable. And a jury might well infer from the testimony that some one of these many laborers present, and witnessing the collision, some of whom rode home on the car that night, knew that the car was unsafe or made such examination as to be satisfied that prudence forbade its use until after a critical examination by a regular inspector or car-builder. While as to the foremen it seems probable that one was not with the men either the 18th or 19th, and knew nothing of the collision or accident to plaintiff until after the latter; that another was not present on the 18th and knew little or nothing of the collision until after the accident to plaintiff; and the third, though present at the collision, seems to have regarded it as a very trifling matter. His testimony concerning it would indicate that no injury to the lever handle could possibly have been done at the collision. A jury regarding the foremen as the only agents of the company disclosed by the testimony for whose acts or omissions the company was liable, might hesitate to say that either knew of any injury to the lever handle or failed to

use such care as was reasonable according to all the information he possessed. Now it cannot be that laborers employed merely to shovel dirt and surface the track so far represent the company in respect to the hand-cars which are used to carry them to the places of labor that their knowledge or means of knowledge of defects therein is the knowledge of the company. Doubtless while in motion the car is propelled by some of them, and while so doing they are in that regard the agents and acting for the company. But outside of that the general care and control must be in those having charge of the work, the foremen. They represent the company in that respect, and some omission or negligence on their part must be shown. Perhaps a jury might say that the testimony shows that they knew or had ample means of knowledge equally with the mass of the laborers, but it cannot be held that they were bound to so find. Hence, the instruction being erroneous, it may have worked injury, and for this reason the verdict cannot be permitted to stand. Shed v. Augustine, 14 Kas. 285. The judgment will be reversed and the case remanded for a new trial.

Duty of Company as to Inspection.—A railroad company is bound to have its track, roadway, bridges, engines, rolling-stock, and in fact all its property used and operated by its employees examined and inspected at proper intervals so that all latent defects therein may be ascertained and repaired. Hard v. Vermont & C. R. Co., 32 Vt. 473; Ford v. Fitchburg R. Co., 110 Mass. 240; Holden v. Fitchburg R. Co., 129 Mass. 268; Keegan v. Western R. Co., 8 N. Y. 175; Warner v. Erie R. Co., 39 N. Y. 468; Harrison v. Central R. Co., 2 Vroom (N. J.), 293; Mansfield Coal & C. Co. v. McEnery, 37 Leg. Int. (Pa.), 28; Chicago & A. R. Co. v. Shannon, 43 Ill. 338; Columbus, C. & I. C. R. Co. v. Troesch, 57 Ill. 155; s. c. 68 Ill. 545; Toledo, W. & W. R. Co. v. Moore, 77 Ill. 217; Indianapolis, B. & W. R. Co. v. Toy, 91 Ill. 474; East St. Louis, P. & P. Co. v. Hightower, 92 Ill. 139; McDermott v. Pac. R. Co., 30 Mo. 115; Hulgh v. New Orleans & C. R. Co., 6 La. Ann. 495; Laning v. New York Central R. Co., 49 N. Y. 521; Shanny v. Androscoggin Mills, 66 Me. 418; Snow v. Housatonic R. Co., 8 Allen, 441; Lewis v. St. Louis, etc., R. Co., 59 Mo. 495; Gibson v. Pacific R. Co., 46 Mo. 163; Fuller v. Jewett, 1 Am. & Eng. R. R. Cas. 109; Porter v. Hannibal & St. Jos. R. Co., 2 Am. & Eng. R. R. Cas. 44; Lake Shore, etc., R. Co. v. McCormick, 5 Am. & Eng. R. R. Cas. 474; Herbert v. Northern Pac. R. Co., 8 Am. & Eng. R. R. Cas. 85; Louisville & N. R. Co. v. Orr, 8 Am. & Eng. R. R. Cas. 94; Umback v. L. S. & M. S. R. Co., 8 Am. & Eng. R. R. Cas. 98; Baker v. Alleghany V. R. Co., 8 Am. & Eng. R. R. Cas. 141; Atchison, etc., R. Co. v. Holt, 11 Am. & Eng. R. R. Cas. 206; Chicago & E. Ill. R. Co. v. Rung, 11 Am. & Eng. R. R. Cas. 218.

GUTHRIE
v.
LOUISVILLE AND NASHVILLE R. R. CO.

(11 *Lea, Tennessee*, 372.)

The duty of the master is absolute to use active diligence to prevent improper or unsafe tools or implements being furnished an employee by which he may be injured. The servant must use reasonable diligence in guarding against such injuries, but he may well rely, to some extent at least, on the faithful performance of duty on the part of his employer, and what might be ordinary care in avoiding an independent danger, might well not be required to guard against a breach of duty on the part of the master which the servant had no reason to anticipate.

Where a laborer upon a railroad, engaged in driving spikes, is furnished by the section-boss with an iron maul known by the section-boss to be defective, and is injured in consequence of such defect, the company is liable, although the defect was patent and would have been known to the servant had he inspected the maul.

APPEAL in error from the Law Court at Humboldt.
McFarland & Bobbitt for Railroad Company.
Cooper, Buchanan & Spence for Guthrie.

FREEMAN, J.—This action is brought to recover for the loss of an eye, by the use of a metal maul, by the plaintiff, while working as an employee of the company in driving spikes fastening down the rails on the track of the road.

It is substantially averred in the declaration that the maul furnished plaintiff by the defendant was defective, and this defect known to the defendant, and that in the proper use of it, while engaged in his employment, under the direction of one Stewart, who was the agent of defendant, the plaintiff's eye was put out by the flying off of part of the head of the maul, and this occurred without the fault of the plaintiff, and by the fault of the defendant in requiring him to work with an insufficient tool.

This is a substantial statement of the case as made by the declaration, and which plaintiff was required to prove to the satisfaction of the jury in order to a recovery, the plea of the defendant being simply "not guilty." Under the instructions of the court, the jury found for the plaintiff, and assessed his damages at $2500, from the judgment on which an appeal in error is prosecuted to this court.

The proof tends to show, and does show, that plaintiff was in the employ of defendant as a bridge carpenter, under the direction of one Stewart as section foreman controlling the work; that on the morning of the injury plaintiff had been engaged in sawing, and one Dual and Wilcox were engaged in spiking down the rails. The

mode of doing this seems to have been, that the two worked together, the one driving the spikes on one side, his companion on the other, and they habitually rendered mutual assistance, the one to the other, in doing the work. A short time before the accident, the foreman (Stewart) ordered plaintiff to leave his sawing and take the place of Dual, and his maul to drive spikes, on the ground that plaintiff was a better hand at this kind of work than Dual, and he was in haste to have the work completed before a train should arrive, which was due in some two hours perhaps. In obedience to this order plaintiff took the maul of Dual, and proceeded to do the work he was doing, taking the maul without special inspection, and with no knowledge of any defect in it. After working half an hour or more, in driving a spike it was bent under a "T" of the rail, as the witnesses express it. When this was seen, plaintiff requested Wilcox, his fellow-workman, to aid him in straightening it, which was done by placing the small end of the maul between the spike and the rail, with the larger or face end turned out so as to be struck by the maul of his companion, the other holding his own maul by the handle, and the force of the blow would thus press the maul between the rail and the bent spike, so as to straighten it and enable it to be driven to its place. When the blow was given by Wilcox for this purpose, a "shiver," as the witness calls it, flew off from the face of the maul, striking plaintiff in the left eye, giving a very painful wound, from which it went out, and so is lost to the plaintiff entirely. It is said also by him that the other eye is weakened and injured, and that this is and would be the case is corrobated by the testimony of his attending physician, who testifies this would be the result of sympathetic action in such a case.

The proof shows very clearly that the use of the maul spoken of was the most usual mode of straightening a spike in such cases, and was altogether proper in itself, and a safe way of doing it, and this was used properly, though a "claw-bar" was also furnished by the company to be so used. But it is evident this was optional with the employees. In fact, the proof tends to show that the "claw-bar" was tried first in this case, but they were unable to straighten the spike with it, and therefore resorted to the mode stated, it being thus shown more effective for the purpose.

In addition, it is shown that knowledge of the fact that this maul had become impaired and needed repair had been communicated to the section foreman, whose duty it was to look after and direct the use of the tools, and who, in fact, had specific charge of the work as the agent of the railroad company.

It is evident on this statement of the facts, that if his Honor, the circuit judge, has correctly instructed the jury, the verdict is one that may well stand, and is abundantly supported by the evidence. Indeed, on the substantial facts stated above, there is no counter-

vailing testimony, no witness being introduced by defendant to the contrary.

The only effort to break the force of plaintiff's testimony was by introducing two written statements, signed by witness Wilcox, one given to Stewart, the foreman, some days after the accident, and another in the form of a series of questions put by Mr. Buquo, an attorney of the road, in August after. These are supposed to weaken, if not contradict, the testimony of this witness. The first, we may say, presents nothing affecting the testimony. It is argued that in this statement the witness is made to say that while they were spiking down the rails together, the spike was "awkwardly" gotten bent under the rail, from which the argument is, that it was the awkwardness or misdirected act of the plaintiff alone which caused the injury. In this, however, the point at issue is mistaken. It is not whether the spike had gotten bent rightfully or wrongly, for their so getting bent seems to have been an usual incident to such work, but whether the use of the maul in its impaired condition was an act of carelessness on the part of the plaintiff, and so the company not responsible. The witness, however, swears that this word "awkwardly" was inserted without his knowledge, and not read to him. There was the clear, uncontradicted testimony of the plaintiff himself in addition, on which the verdict may well rest.

The other statement is unimportant, as far as we can see. Its main point is to show that a claw-bar would have been perfectly safe; that one was provided, and that it would suffice to draw any spike. But there can be nothing in this, as the whole proof shows that the maul was more convenient and more generally used for this purpose; and this is even corroborated by the statement itself. No order forbidding the use of the maul, or directing the use of the claw-bar in preference, is shown. We need not further notice these matters.

We have carefully examined the charge of his Honor, the circuit judge, in this case, and certainly find nothing in it of which defendant can complain. In fact, it is evident the learned counsel was well satisfied with it when put to the jury, as nothing more was asked, nor any modification of what had been said. Its propositions are, that it was the duty of the master, in a case like this, through its agents, to be careful, diligent and skillful in the selection of the tools that it furnished its servants to work with, and also in keeping them in repair after they are furnished, and the employee is responsible for any injury that results to the same, on account of the agents of the master in failing to comply with and discharge this duty, and failing to furnish servants with reasonably safe and suitable tools to work with. This general proposition, with the qualifications after given, is undoubted law, as applicable to this relation.

His second proposition was substantially that the employee undertakes to run all the ordinary risks of the service in which he voluntarily engages. After stating that these were the general rules, he then proceeds to specifically point out their application to the facts of the case in hand. He tells them, if the plaintiff was furnished this maul for work by the foreman, and that the maul was worn and defective, and the plaintiff's eye was put out by reason of this defective condition, in such employment, and the defects known by defendant or its employees, whose duty it was to look after the condition of the maul, or if said employees having such duty might have known of the defects and need of repair, by the use of such diligence and skill as a prudent and careful man would have used in attending to such a matter, the defendant would be liable.

He then defines the measure of care on the part of plaintiff by qualifying the above right of recovery, as follows: "Unless you find that the plaintiff also knew of the defect in the maul himself, or might have known it by the use of ordinary care and attention to it; or unless the injury was the result of the carelessness of the plaintiff as its proximate and efficient cause." But, he adds, "if you find the plaintiff knew of the defect in the maul, and that it was dangerous to use it, or that he might have known it or discovered it by the use of ordinary care and attention, and thereby have avoided its use, it was his duty to do so, and if he disregarded this duty, he could not recover, although in fact he did not know of the defect; or if the careless manner of the use of the maul by plaintiff was the proximate and efficient cause of the injury, then he could not recover."

These are the points of law on which his Honor submitted the case to the jury. We have given them mainly in his own language.

The first proposition, that it is the duty of a railroad company to furnish, in a case like this, safe and suitable tools, is sustained in principle by a number of our own cases. The rule has been laid down in reference to machinery, but the principle is precisely the same where the employee is employed in a service where the tools furnished by his employer are, by custom or usage, or by the actual practice of the employer, to be used by the employee. As to the duty so far as machinery is concerned, see case of Nashville & Chattanooga R. R. Co. *v.* Elliott, 1 Cold. 613; R. R. *v.* Carroll, 6 Heis. 358; R. R. *v.* Jones, 9 Heis. 39; 3 Baxt. 427.

In the case of Elliott, 1 Cold. 617, after laying down the rule, that the servant takes the risks inseparable from his employment, broadly, the qualification is given from Redfield on Railroads as follows: "This doctrine, however, must be taken with the qualification that the employer must take care not to expose the servant to any risk by associating him with other servants wanting ordinary

skill, or by the use of unsafe or unsuitable machinery, or other culpable negligence."

It is seen that this principle thus stated is more affirmative than the statement of his Honor, in that it is said the employer must take care that the machinery "is safe and suitable," and that the employee be not exposed to risks in this direction, or from other culpable negligence. Taking care involves the idea of an active duty imposed, the failure to perform which, when injury occurs, is such negligence as raises a liability for the damages resulting. This is the sound rule, and has been uniformly followed in principle, though not in the precise language quoted by this court.

On the second proposition, as to the duty of the employee, his Honor's charge was favorable to the defendant, for he excuses from liability if the defect was known, "or might have been known by the use of ordinary care and attention," or the carelessness of the plaintiff was the proximate cause of the accident. Now, in reference to a case like this, the true rule is, that the duty of the master is absolute to use active diligence to prevent improper or unsafe tools or implements being furnished an employee, by which he may be injured. 1 Cold. 613.

In reference to this matter the employee may well rely, to some extent at least, on the faithful performance of duty on the part of his employer, and therefore what might be ordinary care in avoiding an independent danger, might well not be required to the same extent to guard against a breach of duty on the part of another, which the party could have no reason to anticipate. The employee had no duty to perform, under the facts in this case, as to the repair of the tools; nor was he called on to inspect them to see whether the master might not have neglected his duties in this reference. There being no special care imposed by the nature of his position, nor obligation to inspect the tools, there could be no want of it, or negligence, or carelessness, in not doing what he was not bound to do by the nature of his employment and the legal obligations arising out of the relations existing between the parties. We do not intend by this, however, to say that the employee is not bound to proper attention, and bound to freedom from actual negligence in avoiding risks incident to his employment.

The defendant cannot complain that the employee did not suspect or anticipate a breach of legal duty on his part, nor watchfully guard against danger from such breach. It is not for him to object that the plaintiff has relied on his faithful discharge of his duty, nor to insist that he should have inspected the tools he was ordered to use for the purpose of seeing whether the master had not violated his duty.

The proof shows he was ordered to take the place of Dual in this case, who was using this maul, and it was but natural that he should have done so without suspicion; and the failure to examine before

using was not carelessness on his part. The law applicable to this case might well have been qualified by his Honor in the way indicated. As charged by him the defendant certainly cannot complain.

We see nothing in the grounds furnished by the affidavit of surprise on which the case can be reversed. The fact of being able to draw the spike with the "claw-bar," or whether it was used before the maul, is unimportant, as the use of the maul is clearly shown not only to have been usual, but a legitimate mode of doing this work. We need not say more than we have said on this aspect of the case.

The jury, under the instructions of his Honor, have found the employer guilty of neglect of duty, and that the plaintiff had used ordinary care and diligence to prevent injury, and was guilty of no negligence on his part. These findings being sustained by the proof, the case must necessarily be affirmed.

See Fuller v. Jewett, 1 Am. & Eng. R. R. Cas. 109; Indianapolis, etc., R. R. Co. v. Estes, 1 Am. & Eng. R. R. Cas. 622; Porter v. Hannibal & St. Joe R. Co., 2 Am. & Eng. R. R. Cas. 44; Cone v. D. L. & W. R. R. Co., 2 Am. & Eng. R. R. Cas. 57; Holden v. Fitchburg R. Co., 2 Am. & Eng. R. R. Cas. 94; Gates v. Southern Minn. R. R. Co., 2 Am. & Eng. R. R. Cas. 237; Kain v. Smith, 2 Am. & Eng. R. R. Cas. 545; Galveston, H. & S. A. R. R. Co. v. Delahunty, 4 Am. & Eng. R. R. Cas. 628; Little Rock, etc., R. R. Co. v. Duffey, 4 Am. & Eng. R. R. Cas. 637; Palmer v. Denver, etc., R. R. Co., 6 Am. & Eng. R. R. Cas. 615; Totten v. Penna. R. R. Co., 6 Am. & Eng. R. R. Cas. 616; Painter v. Northern Central R. R. Co., 5 Am. & Eng. R. R. Cas. 474; Pittsburgh, etc., R. R. Co. v. Sentmeyer, 5 Am. & Eng. R. R. Cas. 508; Louisville & N. R. Co. v. Orr, 8 Am. & Eng. R. R. Cas. 94; Umback v. Lake Shore & Mich. S. R. Co., 8 Am. & Eng. R. R. Cas. 98; Baker v. Allegheny v. R. R. Co., 8 Am. & Eng. R. R. Cas. 141; Durkin v. Sharp, 8 Am. & Eng. R. R. Cas. 520; Atchison, Topeka & S. F. R. R. Co. v. Moore, 11 Am. & Eng. R. R. Cas. 403; Skellinger v. Chicago & N. W. R. R. Co., 12 Am. & Eng. R. R. Cas. 206; Whitman v. Wisconsin & M. R. Co., 12 Am. & Eng. R. R. Cas. 214.

GREENE
v.
MINNEAPOLIS AND ST. L. RY. CO.

(*Advance Case, Minnesota. November* 24, 1883.)

If a servant, who has knowledge of defects in the instrumentalities furnished for his use, gives notice thereof to his employer, who thereupon promises that they shall be remedied, the servant may recover for an injury caused thereby, at least when the master requests him to continue in the service, and the injury occurs before the expiration of the time within which the defects were promised to be remedied, and where the instrumentality, although defective, was not so imminently and immediately dangerous that a man of ordinary prudence would have refused longer to use it. His subsequent use of the defective instrumentality, under such circumstances, could not necessarily, or as a matter of law, make the servant guilty of contributory negligence.

Under such circumstances the servant may recover, although aware, not only of the existence of the defects, but also of the risks to which they naturally expose him.

A railroad company is not relieved from the charge of negligence in sending out an employee with a defective engine simply because it did not have sufficient time after notice of the defect to repair it, and had no other engine in proper condition to send out.

APPEAL from an order of the District Court, Freeborn County.

Lovely & Morgan for respondent.

J. D. Springer for appellant.

MITCHELL, J.—If a servant, before he enters a service, knows, or afterwards discovers, that the instrumentalities furnished for his use are defective, and understands, or by exercise of ordinary observation ought to understand, the risks to which he is thereby exposed, and if, notwithstanding such knowledge, he, without objection, and without any promise on the part of the employer that such defects will be remedied, enters or continues in such service, he cannot recover for injuries resulting therefrom, but will be deemed to have assumed all the risks of the employment thus known. Sometimes this rule has been misapplied by treating a mere continuance of a servant in the employment as conclusive evidence of his having waived objections to the known defects, regardless of facts tending to rebut the presumption of such waiver. But, with the limitations annexed, the rule as stated is undoubtedly the law as established by an unbroken line of authorities, although they disagree somewhat whether it should be put on the ground of waiver or of contributory negligence. Clark *v.* St. P. & S. C. R. Co., 28 Minn. 128.

But it is now almost equally well settled that if a servant who has knowledge of defects in the instrumentalities furnished for his use gives notice thereof to his employer, who thereupon promises that they shall be remedied, the servant may recover for an injury caused thereby, at least where the master requested him to continue in the service, and the injury occurred within the time at which the defects were promised to be remedied, and where the instrumentality, although defective, was not so imminently and immediately dangerous that a man of ordinary prudence would have refused longer to use it.

Under such circumstances his subsequent use of the defective instrumentality would not necessarily, or as a matter of law, make the servant guilty of contributory negligence, but it would be a question for the jury whether, in continuing its use after he knew of the defect, he was in the exercise of ordinary care. Many of the cases go further than this, but this is as far as is necessary to go under the facts of the present case.

Courts also differ as to the ground upon which this should be

placed. Some place it upon grounds of policy and justice—upon a consideration of the unequal situation of master and servant; others, upon the ground that, in such cases, the facts rebut the presumption of a waiver on the part of the servant; others, upon the ground of a contract on the part of the employer, implied from the facts, that if the servant continues in the service in the mean time, and until the defects are remedied, the employer and not the servant will assume the risks.

We will not attempt to determine which of these is the best or most logical reason for the rule, except to say that the last seems to us very forcible; especially where there is a request to the servant to continue in the service. It is sufficient for us that the rule has generally commended itself to the judicial mind (as it does to us) as founded in sound policy and common justice. If the emergencies of a master's business require him temporarily to use defective machinery, we fail to see what he has in law or natural justice to insist that it shall be done at the risk of the servant and not his own, when, notwithstanding the servant's objection to the condition of the machinery, he has requested or induced him to continue its use under a promise thereafter to repair it. Clarke *v* Holmes, 7 Hurl. & N. 948; Hough *v.* Ry. Co., 100 U. S. 213. Patterson *v.* Railroad Co., 76 Pa. St. 389; Laning *v.* Railroad Co., 49 N. Y. 531; Snow *v.* Railroad Co., 8 Allen, 441: Holmes *v.* Worthington, 2 Foster & F. 533. See, also, Ford *v.* Railroad Co., 110 Mass. 240; Greenleaf *v.* Railroad Co., 29 Iowa, 14; Kroy *v.* Railroad Co., 32 Iowa, 357; Cooley, Torts, 559; Shear. & R. Neg. § 96; Moak's Und. Torts, 61–2; Thomp. Neg. 1009, 1010; Wood, Mast. & Serv. §§ 752, 761.

Appellant suggests that the cases only go to the extent of holding the employer liable where the servant, although aware of the defect, is ignorant of the risks, and that they would not apply where, as in this case, the servant, an experienced engineer, fully understood the risk to which the defects in the engine would naturally expose him. An examination of the cases cited will not bear out this position. None of them are made to turn upon any such question. It is true, in the leading case of Clarke *v.* Holmes, supra, Byles, J., in discussing the question how far knowledge of the defect by the servant constitutes negligence, after remarking that knowledge is only an element of negligence, adds: "But a servant knowing the fact may be utterly ignorant of the risk." But however true this is, and however important it may be in other cases, it had no bearing upon the case then being considered, which involved no such questions. Neither is there any warrant for the suggestion that the doctrine of these cases only applies where the servant, in reliance upon the promise, continues in the service supposing that the defects had been already remedied. The statement to that effect in Whart. Neg. 220, finds no support whatever in

the authorities. This disposes of the only important question in this case adversely to the appellant.

The plaintiff was in the service of the defendant as locomotive engineer upon a freight train running between Minneapolis and Albert Lea. On reaching the former place in the morning with his train, upon examining his engine he discovered that the "chafing irons" between the engine and tender were partly broken off. He immediately reported the fact on the "repair book" to the foreman of the round-house, whose duty it was to have the repairs made, and to direct what engines should go out. On returning in the evening to go out with his train he found the engine out, but not repaired. On inquiring of the foreman why the repairs had not been made, the reply in substance was, that he had not had time. On plaintiff suggesting that he did not like to take out this engine, that it was not safe, the foreman replied that he was short of engines to do the work on the road and had no other to send out, and added, "Proceed with that one; you can get it fixed at Albert Lea if you have time; if not, I will remedy it when you get back."

The plaintiff did so and on the way collided with another train, (for which he does not appear to be responsible,) and in attempting to escape was caught between the engine and tender, the defects in the "chafing irons" causing the engine to override the tender and close up the gangway, through which he was attempting to escape. It does not appear that the defect in the chafing irons rendered the engine so immediately dangerous that a man of ordinary prudence would or should under the circumstances have refused to run it. At least, it does not appear so clearly so that a court would hold as a matter of law that plaintiff was guilty of negligence in proceeding with the engine as he did. It does appear that it was liable to break in two at any time, but there is nothing conclusively showing that this would have placed plaintiff in any special personal danger, whatever might have been its effect upon defendant's property. So far as appears there might have been no imminent danger to plaintiff from the defect had not a collision occurred,—an event which he could hardly be expected to anticipate unless defendant's road was so negligently operated that collisions were the rule rather than the exception.

There is nothing in the suggestion that defendant was not guilty of negligence because in fact it did not have a reasonable time to repair this engine that day, and had no other engine in condition to send out. That was no excuse for sending out an engine unfit for use, and it can hardly help the defendant to plead that it did not have good engines enough to do the business of the road. The complaint alleged defects in the engine. On the trial, evidence was admitted without objection of the defective condition of the chafing irons on both the engine and the tender. Defendant after-

wards moved to strike out the evidence regarding the defects in the chafing irons on the tender because not alleged in the complaint. The point was rather technical, for it is a matter of common understanding that a tank and tender are necessary appurtenances to every engine in use. But in any event there was no error in refusing to strike out the testimony. Having been introduced without objection, it was, at most, discretionary with the court whether to strike it out or let it stand, especially as there is no claim that defendant was taken by surprise. Wilson *v.* N. P. R. Co., 26 Minn. 278. The charge of the court that the burden was upon defendant to prove contributory negligence on the part of plaintiff, was in accordance with the law in this State, as long since decided by this court.

If defendant desired a specific instruction to the effect that if contributory negligence affirmatively appeared from the evidence on the part of plaintiff himself, it would be as effectual to bar a recovery as if proven by defendant, he should have so requested. In view of the evidence tending to show that plaintiff's injuries were very serious and probably permanent, there is no warrant whatever for this court to interfere with the verdict on the ground that the damages ($5900) were excessive. The second cause of action set up in the complaint was for slight injuries received by plaintiff in another collision, at another time, and for which the jury awarded him $75. We see no reason for disturbing this verdict. The evidence is very strong that this accident was caused by the gross negligence and recklessness of defendant's superintendent in ordering the movement of a passenger train in disregard of the previous orders of the regular train dispatcher, upon which other trains were moving.

The plaintiff was running his train under orders, and whether in doing so he was using reasonable precautions was under the evidence a question for the jury. We cannot say as a matter of law that he was not. Order affirmed.

See Texas & Pacific Ry. Co. *v.* Kane, and note, infra.

TEXAS AND PACIFIC RY. CO.

v.

KANE.

(*Advance Case, Texas. October* 24, 1883.)

In a suit instituted by the foreman of a certain section of a railroad to recover damages for personal injuries, the complaint avowed that the injuries in question were caused by the negligence of the defendant in failing to furnish plaintiff a safe hand-car.

***Held*, that the said complaint was not demurrable on the ground that it was**

the duty of the plaintiff himself to look to the repairs of hand-cars on his own section.

An allegation in the above complaint, that the defect in the hand-car consisted of a hole in the bottom, of specific dimensions, stated the defect complained of with sufficient accuracy.

Said complaint alleged that defendant, through its agent, had promised to furnish plaintiff with a safe hand-car and to have the defective one repaired, but that it had neglected and failed so to do by reason whereof the injury had occurred.

Held, that the complaint sufficiently alleged an obligation and duty on the part of the defendant to furnish plaintiff with a safe hand-car.

Where a foreman of a section on a railroad gives notice to the proper officers of the company of a defect in the hand-car used by him and a promise is made him by said officers to furnish a new car or repair the old one, it is not contributory negligence for him to continue to use the old car a reasonable length of time. What is such a reasonable length of time depends on circumstances and is for the jury.

In an action for personal injuries all actual damages, resulting naturally from the act complained of, may be recovered under a general averment of damage.

It was error in the above case to instruct the jury positively that plaintiff had given notice to the company of the defect in the hand-car, where the company denied that such was the case.

James Turner for appellant.
Tilson & Henderson for appellee.

Willson, J.—This suit was instituted by appellee to recover of appellant $500 damages for alleged injuries sustained by him by reason of being run over by a hand-car while he was in the employment of appellant. He alleged in his petition in substance: that he was in the employment of appellant as foreman on a section of the road; that appellant by the contract of employment undertook to furnish him with a safe, good, and sufficient hand-car for him to travel on from one part to another of said section, to attend as section foreman to the business of appellant; that on the 26th of August, 1881, while travelling on said section in a hand-car provided for him by appellant, and while engaged in attending to his duties as section foreman, he was thrown from said hand-car, and seriously injured thereby; that said hand-car ran over him, and wounded and bruised him greatly, and that by reason of the injuries thus received he was damaged in the sum of $500, said damages consisting in physical suffering, six months' loss of time, money paid for medical attention, nursing, etc.; that this injury was caused by a defect in the hand-car; that said defect consisted in a hole in the floor of said hand-car, about 18 inches long and four inches wide; that while the hand-car, upon which he was travelling, was in rapid transit over the road, an iron tool about 18 inches in length, which was being carried on the car, fell through the hole aforesaid, one end striking against a cross-tie and the other against the car, which caused him to be thrown in front of the car,

and the car ran over him; that appellant well knew of said defect in said hand-car, and promised him that the same should be remedied as soon as possible, and told and required him to go ahead and use said hand-car; that appellant failed to remedy said defect in said hand-car according to promise.

Appellant filed a general demurrer and special exceptions to the petition, which were overruled, and, upon a trial of the case, appellee recovered a judgment against appellant for $500 and costs.

It is assigned as error that the court overruled the general demurrer to the petition. In support of this assignment it is urged:

1st. The demurrer should have been sustained, because it appeared from the petition that the plaintiff was himself foreman in his department, representing the master therein; that the defendant, a corporation, can only act by its agent, and that it was the duty of the plaintiff himself, as the representative of the master, to see that the hand-car was repaired.

2d. The position as section foreman (as the name implies) is the first and supreme agent of the defendant in his department, under whom all others on the section are placed, and that to him the master must look for the proper conduct of the business of the section, and that his duties must include the supervision and care of the tools and machinery of the section, and repairs of such tools and machinery.

To warrant the court in sustaining the general demurrer upon the grounds stated, it would have to be assumed that the court judicially knew that it was the duty of appellee to repair the defective car. This would be extending the range of judicial knowledge beyond any limit yet prescribed, so far as we are aware. We know of no law which requires the foreman of a railroad section to repair tools, machines, etc., in his charge as such foreman. If by the contract of his employment, or by the rules and regulations of the company made known to him, the duty devolved upon appellee to repair the hand-car, this fact would be a matter of defense to be pleaded and proved by appellant. It is a question of fact and not one of law, a question to be presented by plea, and not by demurrer. We are of opinion that the allegations in the petition disclose a good cause of action in appellee, and that the court did not err in overruling the general demurrer.

We think appellant's second assignment of error, which relates to the ruling of the court in overruling its four special exceptions to the appellee's petition is not well taken. 1st. It is alleged in the petition that the defect in the hand-car consisted in a hole in the bottom of it, giving the dimensions of the hole, etc. We think this was sufficiently specific as to the defect. 2nd. It is sufficiently and we think clearly alleged in the petition that appellee sustained damages by reason of the neglect of appellant to furnish him with

a safe hand-car. 3d. It is alleged that the appellant, through its agent, had promised to furnish appellee with a safe hand-car, and to have the defective one repaired, and failed so to do, and that by reason of such failure appellee sustained the injuries complained of. This, we think, sufficiently alleged an obligation and duty on the part of the company to supply appellee with a safe hand-car. 4th. Appellant says that the petition shows upon its face that if plaintiff was ever injured as alleged, it was because of his own negligence and not the negligence of the defendant, and that if there was any negligence by defendant as alleged, the said petition shows contributory negligence on the part of the plaintiff, and that the defendant well knew the defects, if any, in the hand-car. We do not so understand the averments in the petition. It very clearly alleges negligence on the part of the company in failing to supply appellee with a safe hand-car after being notified that the one he was using was defective. It alleges a promise on the part of the company to have the defective car repaired, or to furnish a safe one in its stead, accompanied by a request that appellee would continue to use the defective car until a better one could be supplied. It does not show upon its face that it was the duty of the appellee to repair the defect in the hand-car, and it cannot be assumed as a matter of law that such was his duty.

It is strenuously contended by appellant's counsel that as appellant knew of the defect in the hand-car it was his duty as a servant of the company to repair it, and that as he did not do this, but continued to use the same in its defective condition, he was guilty of contributory negligence, and therefore could not recover in this action. In support of this position we are cited, among other authorities, to the case of the H. &. T. C. R. R. Co. *v.* Myers, 55 Tex. 110, where it is said, "The company is required by the plainest dictates of reason and rules of law, to furnish to its servants operating trains, good, sound, and suitable machinery, apparatus, and material necessary in the conducting of that business; and generally the company is liable to its servant for injuries resulting from the use of defective machinery, apparatus, or material in the discharge of their duty, provided the company knew, or should have known by reasonable care, that the same was so defective or unfit for the purposes for which it was furnished. This rule is subject to a qualification founded in reason and amply sustained by authority, and that is, if the servant, after having knowledge of the defective machinery, apparatus, or material, remains in the service and attempts to use the same and is thereby injured, he cannot recover of the company for such injury." There is no question but that the doctrine above quoted is correct, and well settled by the authorities. But the qualification mentioned to the rule as to the liability of the company is itself subject to a qualification equally as well settled, which is, as stated by Mr. Thompson, as follows: "A

servant does not, by merely continuing in the service, after knowledge of defects in the machinery which he is obliged to use, assume the risks attendant upon the use of such machinery. Such a result only follows where he continues in the service without objection or protest or without being induced by his master to believe that a change will be made. If the master has promised to remedy the defect or has held out other like inducements to the servant to remain in the service, the mere fact of his having remained in the service will not, of itself, as matter of law, exonerate the master from liabilities; but the question of negligence will be for the jury. If the servant, after acquiring knowledge of the defect, complains of it to the master and the master assures him that it will be repaired in a reasonable time, he will not be presumed to have waived the defect by remaining for such reasonable length of time in the service, and what will constitute such reasonable length of time will depend upon the circumstances of each case, and will be a question of fact for the jury." 2 Thompson on Neg., sec. 16, p. 1009. See, also, Shear. & Red. Neg., sec. 96; Hough v. Railway Co., 100 U. S. 213, where this qualification is fully discussed and the authorities cited sustaining it.

Appellee by the averment in his petition very clearly, we think, brought himself within the qualification last quoted, and hence his petition is not obnoxious to the fourth special exception urged against it.

It was not error to admit evidence of general actual damages. Such actual damages as result naturally from an act complained of may be recovered under a general averment of damages, and need not be specially pleaded. Le Relle v. W. U. Tel. Co., 55 Tex. 308; T. &. P. Ry. Co. v. Durrett, 57 Tex. 48; H. & T. C. Ry. Co. v. Boehm, 57 Tex. 152. No special damages were alleged in the petition, except expenses for medical attention and nursing, but the evidence objected to and admitted was confined to general actual damages such as would naturally result from the act complained of, and was therefore admissible under the general allegations of damage.

Several errors are assigned to the charge of the court which we deem it unnecessary to discuss in detail. We think the charge, with one exception, correctly stated the law of the case and was substantially sufficient. It is, however, manifestly and materially erroneous in one particular. We allude to that clause which is in the following words: "The evidence shows that the plaintiff, Kane, had given notice of the defect in said hand-car to defendant's authorized agents or supervisors, which was notice to the defendant, and his, the said agent's, negligence would become the negligence of defendant." This clause of the charge assumes as undisputed facts, important issues in the case. Appellant denied that it had any knowledge of the defects in the hand-car, and denied that no-

tice of any defect had been given to it through any of its authorized agents. These were issues of fact in the case for the jury alone to determine. It was not for the court, but for the jury to say whether or not the notice of the defect had been given to an authorized agent of appellant. Upon this issue depended mainly appellee's right to recover in this action. It was a controlling issue in the case, and the court had no authority, whatever might be the evidence upon it, to arrogate to itself the province of the jury and determine the issue in favor of the plaintiff. It was clearly a charge upon the weight of evidence, and upon a material issue, and was well calculated to influence the verdict of the jury. Rev. Stat. Art. 1317; T. & P. Ry. Co. *v.* Murphy, 46 Tex. 356. Because of this error in the charge the judgment must be reversed and the cause remanded.

There are other assignments of error which we have deemed it not essential that we should discuss. We will say, however, that we think the court did not err in refusing to give the special charges requested by the appellant, as they did not contain the law as applicable to the facts of the case, as we understand the law and the facts to be.

Reversed and remanded.

Continuing use of Defective Apparatus without Notice.—Where a servant after observing a defect in the apparatus employed by him, fails to notify the company and continues to use the apparatus without complaint or objection, he cannot recover in case of an injury resulting therefrom. Crutchfield *v.* Richmond, etc., R. R. Co., 78 N. C. 300; Kroy *v.* Chicago, etc., R. Co., 32 Iowa, 357; Way *v.* Illinois, etc., R. R. Co., 40 Iowa, 341; Toledo, etc., R. R. Co. *v.* Eddy, 72 Ill. 138; Davis *v.* Detroit, etc., R. Co., 20 Mich. 105; Flannigan *v.* C. & N. W. R. Co., 2 Am. & Eng. R. R. Cas. 150; Green & Coates Sts. Pass. Ry. Co. *v.* Bresmer, 4 Am. & Eng. R. R. Cas. 647; Ballou *v.* Chicago, etc., R. Co., 5 Am. & Eng. R. R. Cas. 480; Rains *v.* St. Louis, etc., R. Co., 6 Am. & Eng. R. R. Cas. 610; Houston & T. C. R. Co. *v.* Myers, 8 Am. & Eng. R. R. Cas. 114; Louisville, etc., R. R. Co. *v.* Orr. 8 Am. & Eng. R. R. Cas. 94; Umback *v.* L. S. & M. S. R. Co., 8 Am. & Eng. R. R. Cas. 98; Sweeney *v.* Central Pacific R. R. Co., 8 Am. & Eng. R. R. Cas. 571; DeForest *v.* Jewett, 8 Am. & Eng. R. R. Cas. 495; Mayes *v.* Chicago, etc., R. Co., 8 Am. &. Eng. R. R. Cas. 527: Watson *v.* H. & T. C. R. R. Co., 11 Am. & Eng. R. R. Cas. 213; McQueen *v.* Central Branch Union Pac. R. Co., supra.

Continuing use of Defective Apparatus after Notice.—Where the servant has given notice to the company of the defect and promises have been made to him that the defect shall be remedied and inducements or persuasions held out to him to continue his work, he is not guilty of contributory negligence per se in continuing the use of the defective apparatus for a reasonable time. Laning *v.* New York Central R. R. Co., 49 N. Y. 521; Belair *v.* Chicago, etc., R. Co., 43 Iowa, 682; Crutchfield *v.* Richmond, etc., R. Co., 78 N. C. 300; Colorado, etc., R. Co. *v.* Ogden, 3 Col. 499; Snow *v.* Housatonic R. Co., 8 Allen, 441; Patterson *v.* Pittsburgh R. R. Co., 76 Pa. St. 393; Little Rock & Ft. S. R. R. Co. *v.* Duffey, 4 Am. & Eng. R. R. Cas. 137; Greene *v.* Minneapolis & St. L. R. Co., supra.

The question of contributory negligence is, in such case, for the jury. Le Claire *v.* Railroad Co., 20 Minn. 9; Stoddard *v.* St. Louis, etc., R. R. Co., 65 Mo. 514; Smith *v.* Union R. Co., 61 Mo. 591.

East Tennessee, Virginia and Georgia R. R. Co.
v.
Smith.

(9 *Lea* (*Tennessee*), 685.)

In action by an employee against a railroad company for personal injury resulting from negligence in equipment of a hand-car, wherein contributory negligence was a defense, the following charge on that subject was held not positive error: "If the handle of the lever was defective, and such defect was known to the plaintiff, and he accepted, or continued in its service, using the same with full knowledge of the defects, he could not recover;" and "if the plaintiff might, by the exercise of ordinary care, have escaped the injury, he cannot recover."

The Supreme Court will not disturb a verdict, "though the jury might well have found the weight of proof to be the other way."

Appeal in error from the Law Court at Bristol.
N. M. Taylor and W. D. Haynes for Railroad.
Bailey & McCroskey for Smith.

McFarland, J.—This action was brought by Smith. In his declaration he avers that he was an employee of the railroad company as a "section hand," and while so employed received serious injuries in consequence of gross negligence and want of caution upon the part of the company in respect to a defect in the machinery and equipping of a hand-car placed on the road for the use of the "section hands," which defect was known to the company, or might have been known by proper diligence.

The facts as deposed to by the plaintiff and others, are in substance that at the close of the day's work on the 2d of June, 1881, the plaintiff and the other section hand, in obedience to the orders of the "section boss," put the "tools" on the "hand-car" or "lever-car," and started with it to the tool chest, while moving in that direction and while plaintiff was standing on the front of the car and working one end of the lever, the handle broke, throwing him off in front of the car, which ran over him, injuring him badly. The handle was of wood and had been in use about a month. One witness says he examined the handle that was broken and he thought it looked "doaty" in the centre, or had something like a "dry rot," though he did not examine it carefully.

For the defendant the section boss proves that he examined the handle after it was broken, and it was perfectly sound—it was made of "red hickory," by one Beedleman. Beedleman proves that he made it, under a contract to make handles for the company, that it was cut from a "white hickory" tree, and was sound. He

says, however, that it was one and a half inches in diameter where it went through the socket, and thinks it ought to have been larger to make it safe. He helped put in the handle but did not test its strength otherwise than by his eye. There was proof tending to show that at the time of the accident, the hands were endeavoring to run the car rapidly, so as to get out of a shower of rain. Plaintiff had been in the employ, "off and on," for six years, most of the time as a "section hand."

The charge of the judge is made up, to a great degree, of extracts from various opinions of this court on kindred questions. It embraces some matters not strictly applicable to the facts of the case, but probably not misleading. Several propositions were submitted by the counsel of the defendant, which the court declined to give, except so far as embraced in his general charge. Without noticing these in detail, it is only necessary to consider whether there was any material error in regard to the vital and turning points in the case.

The only defect in the car attempted to be shown, was in the handle of the lever. The defects in the handle were, that it was made of unsound wood, and was too small. As to the first defect it was insisted for the company, that it was not responsible for latent defects when the article was purchased from a manufacturer. The rule as established in Railroad *v.* Jones, 9 Heis. 27, is, that a railroad is not responsible for the negligence of a manufacturer from whom it purchases machinery. That if the defect be such as could not be discovered by the company upon application of the proper tests, then it would not be liable, although the manufacturer might have discovered the defects. The judge's charge on this point is in the language of Judge Nicholson, in the case referred to. It required no special skill or scientific knowledge to test the strength of a wooden lever or handle like the one described.

In respect to the defect in the size of the handle, the controlling question, undoubtedly was, whether or not the plaintiff had as full knowledge of this defect as any one else, that is to say, whether he could not see the size of the handle, and may be supposed to have as sound judgment as to the probable strength of a handle of that size as any one, as the determination of such a matter required no special knowledge or scientific skill, and if with such knowledge, the plaintiff elected to continue in the service, he would be regarded as voluntarily electing himself to take the risk.

This is the principle of the case of Railroad *v.* Hodges, relied upon by the counsel of the company. Upon this point the judge charged the jury "that if the handle of the lever-car was defective, and such defect was known to the plaintiff, and he accepted service, using the same, or continued using the same with full knowledge of the defects, he could not recover," and again, "if

the plaintiff might, by the exercise of ordinary care, have escaped the injury, he could not recover."

The special requests on this point were not more directly applicable to the facts than the charge above given, in fact, the special requests on this point are somewhat more general than the language of the charge.

There is, therefore, no positive error in the charge or in the refusal to give the further instructions asked. The question then arises whether there is evidence to support the verdict?

So far as the defect in the size of the handle is concerned, it is apparent that the plaintiff had full knowledge and was as capable of judging the strain a handle of that size would probably bear, as any one else, and with this knowledge he continued its use at his own risk. The principle of the Railroad v. Hodges case, directly applies.

The verdict, then, must rest upon the proof that the handle was not of sound wood, and that this might have been discovered by the employees of the company who put it in, by reasonable care or testing its strength, and there is proof to this effect, and although the jury might well have found the weight of proof to be the other way, yet, under the rules of this court we cannot disturb the finding.

The judgment will be affirmed.

See Green v. Minneapolis, etc., R. Co., supra; Texas & Pacific R. Co. v. Kane, and note, supra; and McQueen v. Central B. Union Pac. R. Co., and note, infra.

McQueen
v.
Central Branch Union Pacific R. R. Co.

(*Advance Case, Kansas. November* 9, 1888.)

Where the plaintiff was in the employ of the railroad company, painting depots, bridges, tanks, and switches along the line of the road, and was transported over the road to discharge the duties of his employment, in a small steam-car used only by the officers and employees of the railroad company, which car was propelled by steam and was something after the shape of a hand-car; *held*, that plaintiff was merely an employee of the railroad company, riding upon the road in the steam hand-car, in consequence of his employment and as an employee, without paying any fare; therefore, he was not a passenger within the true sense of that term, nor entitled to the rights of a passenger.

In an action for personal injury, the plaintiff, employed and transported as above stated, offered evidence tending to prove that he was injured by a steam hand-car jumping from the track, caused by the carelessness of the

company in using defective wheels, in this, that the flanges of the wheels were not as deep as the wheels of other cars, and that the wheels were worn flat. It did not appear that the plaintiff rode upon the car under any special orders of the company, or made any report of the alleged defects to the company or to any of its officers, or that he had any promise or assurance of the company that it would remedy the defects in the wheels of the car or provide new wheels; and before the injury complained of, the defects in the wheels (if any existed) were plainly visible, and the plaintiff not only had full opportunity to acquire knowledge of the condition of the wheels, but must have known their condition. *Held*, therefore, that even if the defects existed in the wheels, the company was not liable to the plaintiff, because he must be held to have either voluntarily run the risk of being injured, or to have been guilty of contributory negligence.

Tomlinson & Griffin and H. M. Jackson for the plaintiff in error.

Everest & Waggener for the defendant in error.

HORTON, C. J.—Action for personal injury. The court instructed the jury, upon the facts proved upon the trial, that the plaintiff was not entitled to recover, and directed the jury to return a verdict for the company.

The principal question in this case is, whether the plaintiff was a passenger, or entitled to the rights of a passenger, at the time of his injury. The facts are substantially these: The plaintiff, on June 6th, 1878, was, and for a year prior thereto had been, in the employ of the railroad company, painting depots, bridges, tanks, and switches; part of the time working in the city of Atchison, and part of the time along the line of the road. In the early part of June, 1878, he started for Waterville, accompanied by the engineer, on a small steam hand-car, used only by the officers and employees of the railroad company. The car was propelled by steam, and was something after the shape of a hand-car. It had two pair of wheels. They were about eighteen inches in diameter, connected by a rod or crank, and were the ordinary width of the track. The front pair were about two and one-half or three feet from the rear pair. There was a horizontal steam engine, of three-horse power, very near the center, about the size of a small stove. The boiler rested in an upright position, and was about two feet in diameter. The coal box was situated on the left of the boiler. There was a water tank under the rear seat. The car had two seats, one on the front and one in the rear. The plaintiff painted the uprights of the switch boards at all the stations on his way to Waterville. On the morning of the 6th of June, 1878, he started from Waterville on the steam hand-car to return to Atchison, and in coming into Netawaka, as the steam hand-car passed in on the side track, the car jumped the track. Plaintiff was thrown some ten or twelve feet, his face striking the ground, and the car falling upon his ankle or foot. After being injured he did not stop to

discover the cause of the car jumping off the track, but rode into Atchison on the same car.

The evidence did not disclose any contract between the plaintiff and the company for his transportation over the road, but it is clear therefrom that he was carried from station to station upon the road, so that he might discharge the duties of his employment. Upon the facts proved, the plaintiff was merely an employee of the railroad company, riding upon the road in the steam hand-car in consequence of his employment; and as an employee, paying no fare, he was not a passenger within the true sense of that term, nor entitled to the rights of a passenger. Shearman and Redfield on Negligence, 101–127; 1 Redfield on Railways, 520–537; Railway Co. v. Nichols, 8 Kas. 505; Railway Co. v. Salmon, 11 Kas. 83.

Counsel for plaintiff say, however, that even if the plaintiff was not a passenger on the steam hand-car at the time of the injury, yet that he is entitled to recover damages, because there is some evidence showing that his injury was caused by the carelessness of the company in using defective wheels to the steam hand-car upon which he was transported from station to station, on his return from Waterville to Atchison. The defects in the wheels of the car (if any existed) were that the flanges on the wheels were not as deep as other wheels, and that the wheels were worn flat. Even if the wheels were defective, as testified to by the plaintiff, nevertheless the company in this instance was not liable, although the defects were such as under ordinary circumstances the company would be bound to remedy, as the plaintiff was equally chargeable with the notice of the defects as the company. He was well acquainted with the steam hand-car and the wheels thereof. At Vermilion station, prior to the accident, he had helped to shove the car back a mile, so as to let the passenger train go past. He had got on and off at every station. Had full opportunity to know the condition of the wheels. He testified he had examined the car. That he had wiped the car several times before the injury, and the wiping consisted in taking all the oil off the wheels.

If the plaintiff rode upon the car without any special orders of the company, and made no report of such defects to the company, or to any of its officers, and had no promise or assurance from the company that they would remedy the defects in the wheels of the car, or provide new wheels therefor, with the knowledge he had of the condition of the steam hand-car and the wheels at the time of the injury, he must be held to have either voluntarily run the risk of being injured or to have been guilty of contributory negligence. If any defects existed in the wheels of the car, they were plainly visible, and the plaintiff had not only full opportunity to acquire a knowledge of the condition of the wheels, but must have known their condition. Therefore, if the defects existed, he was not entitled

to recover. Woodley *v.* Railroad Co., 2 Exch. Div. 384; Kielly *v.* Mining Co., 3 Saw. 500; Hayden *v.* Manufacturing Co., 29 Conn. 548; Railroad Co. *v.* Kinney, 58 Ga. 485; Lumley *v.* Caswell, 47 Ia. 159; Railroad Co. *v.* Monroe, 85 Ill. 25; Coal Co. *v.* Reed, 6 O. L. J. 272; Artman *v.* Railroad Co., 22 Kas. 299.

In this connection, perhaps we ought to say that the engineer in charge of the steam hand-car at the time of the injury testified, after the car jumped the track he looked at the rims on the inside of the wheels; that they were not worn so as to hurt the car any; that they were all right; that the wheels were not worn to any great extent; that the wear on them was not noticeable; that they were in good condition and nothing the matter with them; also that a large amount of other evidence was offered by the company tending to prove the same facts, and to show that the accident was an unavoidable one.

The judgment of the District Court will be affirmed.

All the justices concurring.

When Servant is and is not a Passenger.—The principal case is entirely in accord with the current of authority on the particular subject involved. When a servant is being transported either to or from his work upon a railroad without paying any compensation therefor, he is not considered as a passenger, but retains in all respects the position of a servant. The company is therefore only liable to him as a servant. Gillshannon *v.* Stony Brook R. Co., 10 Cush. 288; Ryan *v.* Cumberland Valley R. Co., 23 Pa. St. 384; Russell *v.* Hudson River R. Co. 17 N. Y. 134; Tunney *v.* Midland R. Co., L. R., 1 C. P. 291; Hutchinson *v.* York, etc., R. Co., 6 Eng. Ry. Cases, 580; Seaver *v.* Boston, etc., R. Co., 14 Gray, 466; Columbus & Indianapolis R. R. Co. *v.* Arnold, adm'r, 31 Ind. 174. But see contra, Fitzpatrick *v.* New Albany, etc., R. Co., 7 Ind. 436; Gillenwater *v.* Madison, etc., R. Co., 5 Ind. 339; and see Pool *v.* Chicago, M. & St. P. R. Co., 3 Am. & Eng. R. R. Cas. 332.

Where the servant is carried in consideration of a deduction from his wages, a different rule, of course, obtains. He is then considered as being carried for hire, and is a passenger. O'Donnell *v.* Allegheny, etc., R. R. Co., 59 Pa. St. 239. The conductor of private freight cars, not in the employ of the railroad company, is not considered as a servant. He is a passenger. Cumberland Valley R. R. Co. *v.* Myers, 55 Pa. St. 288.

The servants of contractors employed in constructing the road are, when transported by the company's cars, considered as passengers. Graham *v.* Toronto, etc., R. Co., 23 Upp. Can. C. P. 541; Torpy *v.* Grand Trunk R. Co., 20 Upp. Can. G. B. 446; Sheerman *v.* Toronto, etc., R. Co., 34 Upp. Can. Q. B. 451.

Where a servant is injured in course of transportation, and the original complaint for damages states the injury occurred while he was being transported as a passenger, the same may be so corrected as to correspond with the facts, the court permitting the amendment. Kansas Pac. R. Co. *v.* Salmon, 14 Kansas, 512.

Servant Knowingly Using Defective Apparatus.—Under such circumstances the servant cannot recover in case of an accident to himself occasioned thereby. Walsh v. St. P. & D. R. Co., 2 Am. & Eng. R. R. Cas. 144; Green & Coates St. Pass. Ry. Co. *v.* Bresmer, 3 Am. & Eng. R. R. Cas. 647; Lake Shore, etc., R. Co. *v.* McCormick, 5 Am. & Eng. R. R. Cas. 474; Ballou *v.*

Chicago, etc., R. Co., 5 Am. & Eng. R. R. Cas. 480; Rains v. St. Louis, etc., R. Co., 5 Am. & Eng. R. R. Cas. 610; Houston & T. C. R. Co. v. Myers, 8 Am. & Eng. R. R. Cas. 114; Louisville, etc., R. R. Co. v. Orr, 8 Am. & Eng. R. R. Cas. 94; Umback v. L. S. & M. S. R. Co., 8 Am. & Eng. R. R. Cas. 98; Sweeney v. Central Pac. R. Co., 8 Am. & Eng. R. R. Cas. 151; De Forest v. Jewett, 8 Am. & Eng. R. R. Cas. 495; Mayes v. Chicago, etc., R. Co., 8 Am. & Eng. R. R. Cas. 537; Cunningham v. Chicago, M. & St. P. R. Co., 12 Am. & Eng. R. R. Cas. 217; Greene v. Minneapolis & St. L. R. Co., infra; Texas Pac. R. Co. v. Kane, infra.

LEAHY
v.
SOUTHERN PACIFIC R. R. CO.

(*Advance Case, California. April* 24, 1884.)

Where no jury has been drawn or summoned to attend the session, the court, in a civil action, may either order a jury drawn and summoned to attend forthwith, or may direct the sheriff to forthwith summon as many men to serve as jurors as may be required.

In an action for damages for death caused by negligence, it is not error to admit evidence of the condition of the remains of deceased.

Where instructions asked are refused, but no exception taken, such rulings cannot be reviewed on appeal.

In an action to recover damages from a railroad company for causing the death of a brakeman it appeared that the cause of the accident was a flaw or crack in the brake. The evidence was conflicting as to whether this flaw or crack could have been discovered by the exercise of reasonable care on the part of the company. *Held*, that this question was properly left to the jury.

The evidence in above case was also conflicting as to whether deceased had or had not contrary to rules used a club or lever to set up the brake, this being the cause of the occurrence of the accident. *Held*, that this question was also properly left to the jury.

APPEAL from the Superior Court of Santa Clara county.

This was an action by the representatives of William Leahy for damages for his death. The complaint alleged that said Leahy was killed while acting in the capacity of brakeman for defendant, through the negligence of said defendant in having provided imperfect brake machinery on the cars where plaintiff was required to operate. Verdict and judgment were for plaintiff, and defendant appealed.

As errors of the trial court defendant assigned among others the following, viz.: That evidence of the condition of the remains of deceased was improperly admitted, as it tended to excite the sympathy of the jury, and was directly prejudicial to the defendant; that the court erred in denying defendant's motion for a nonsuit on the ground that, though plaintiff had alleged Leahy's death by

negligence of defendant, through a defective wheel, they had not offered any evidence to show how Leahy came to his death, nor how the wheel came to be broken; the only facts proven being the time and place of his death, the fact of the breaking of the wheel, and the existence of a flaw in the wheel.

The other facts are stated in the opinion.

McKisick & Rankin for appellant.

D. M. Delmas for respondent.

SHARPSTEIN, J.—Jurors not having been drawn or summoned to attend the session at which this action was tried, the court was authorized to order a sufficient number to be forthwith drawn and summoned to attend court, or, by an order entered in its minutes, direct the sheriff forthwith to summon so many good and lawful men of the county to serve as jurors, as might be required. Code Civil Proc. 226. The court adopted the latter method. This constitutes no error in law, nor even irregularity in the proceedings of the court.

The exception to the ruling of the court on the defendant's objection to evidence, of the condition of the remains of the deceased, cannot be sustained.

On the question of defendant's negligence there was sufficient evidence introduced by the plaintiff to justify the court in submitting it to the jury.

The motion for nonsuit was properly overruled.

Several instructions were asked by the defendant and refused by the court. But it does not appear that any exception was taken. In the absence of an exception, none of said rulings can be reviewed here.

On the trial certain facts were established beyond controversy: (1) The plaintiff's intestate, Leahy, was killed while in the employment of the defendant as a brakeman on one of its freight trains; (2) there was a flaw or crack in the hub of the wheel, which said Leahy had to turn in order to set up the brake for the purpose of checking the movement of the train; (3) the hub of said wheel was rendered more liable to break by reason of said flaw or crack; (4) if it broke while the brakeman was setting up the brake, there would be great danger of his being precipitated between two cars and killed.

The jury were justified in finding that the death of said Leahy was caused by said wheel breaking while he was in the act of setting up the brake.

Defendant's counsel, however, insist that the flaw or crack in the hub of said wheel was invisible so long as said wheel was in place, and that there is no evidence which tends to prove that said wheel was not sound and safe when placed in position; and that the evidence shows that defendant employed a competent person to in-

spect said wheel, and that the same was inspected by him as often as a due regard for the safety of the brakeman required that it should be. The plaintiff introduced some evidence which tended to show that said flaw or crack could not have been difficult of discovery when said wheel was in place; and the jury had before it the broken wheel, as well as other wheels of the same kind, and it is impossible for us to say how much the jury may have been aided thereby in determining whether said flaw or crack might have been discovered by the exercise of due diligence on the part of defendant. Upon that question we think there is a substantial conflict of evidence.

It is further claimed on behalf of the defendant that, notwithstanding said flaw or crack, said wheel could not have been broken by said Leahy, if he had not, in violation of a rule of defendant, used a lever or club to set up the brake; and there is evidence tending to prove that Leahy had a club of that description on the train of which he was a brakeman. One witness testified for the defense that on the morning of the accident he saw a brakeman on the defendant's train, at or near the time and place where Leahy was killed, "setting up a brake, on top of a box car, with a club." If the jury had given full credit to the testimony of this witness, it would doubtless have found that Leahy was the brakeman whom the witness saw on that occasion. Another witness for the defense testified that he found a brakeman's club about 10 hours after the accident, on the railroad track, within 29 steps of the place where he had previously found Leahy's body. That the club so found had been Leahy's is not disputed. There was evidence tending to prove that it was dangerous to use such a club in setting up brakes.

The plaintiff in rebuttal introduced a witness who testified that he saw Leahy just before the accident going towards the wheel which broke, and that when within four feet of it he had no club. Another testified that he, with many others, walked up and down the track where, and soon after, the accident occurred, and that he saw no club, although it was a subject of conversation between him and some of those who were with him. The plaintiff's counsel insists that it is highly improbable that this witness and those who were with him would have overlooked a club, about which they were conversing, if it had been on the track, at the point and in the position where defendant's witness testified to finding it. It is further contended that the jury might well have doubted the accuracy of the witness who testified to having seen a person on the train of which Leahy was a brakeman setting up a brake with a club. That witness was an engineer, who, at the time, had charge of a locomotive to which was attached a train of cars then in motion, on a road which, at that point, runs near defendant's road. As both trains were moving at some distance from each other, it is claimed that he was not in a position to observe accurately the ac-

tions of a brakeman on the neighboring train. These were circumstances which the jury might properly consider in determining whether Leahy used a club in setting up the brake on that occasion. The jury had an opportunity for observing the appearance and manner of the witnesses introduced by both sides, and of inspecting the club and broken wheel. Experiments also were made in the presence of the jury, the result of which may have greatly influenced their verdict. How much enlightenment the jury may have derived from these circumstances cannot be estimated by this court. Therefore, a case is not presented in which we would be authorized to hold that the evidence is insufficient to justify the verdict of the jury and the decision of the court on a motion for a new trial.

Judgment and order affirmed.

Myrick, J., dissenting. As I understand the testimony, there is no conflict as to the proposition that the deceased was, at the time of the occurrence, endeavoring to "set up" the brake with the use of a brake-club; that the use of a club was prohibited by the defendant, and that such use contributed directly to the calamity. I therefore dissent. As to the other points referred to in the foregoing opinion, I agree with my associates.

Defective Brakes.—As to injuries from defective brakes, see Henry *v.* Staten Island R. Co., 2 Am. & Eng. R. R. Cas. 60; Painton *v.* Northern Central R. R. Co., 5 Am. & Eng. R. R. Cas. 454; Herbert *v.* Northern Pacific R. R. Co., 8 Am. & Eng. R. R. Cas. 85; Columbus & Zenia R. R. Co. *v.* Wells, Adm., 12 Ohio St. 475; Illinois Central R. R. Co. *v.* Jewell, 46 Ill. 99; Chicago & N. W. R. Co. *v.* Taylor, 69 Ill. 461; Wonder *v.* Baltimore & Ohio R. R. Co., 32 Md. 411; Disher *v.* N. Y. Central & H. R. R. Co., infra; Cf. Costillo *v.* Syracuse, etc., R. Co., 65 Barb. 92; Oldfield *v.* N. Y. & Harlem R. R. Co., 3 E. D. Smith, 103; s. c., 14 N. Y. 310; Owen et al. *v.* Hudson River R. R. Co., 7 Bosw. 329; New York, L. E. & W. R. R. Co. *v.* Daugherty, 6 Am. & Eng. R. R. Cas. 189.

Disher

v.

N. Y. Central and Hudson River R. R. Co.

(*Advance Case, New York.* 1884.)

In an action by a brakeman against a railroad company to recover damages which were caused by the fracture of a brake which plaintiff was using, the alleged negligence on the part of the company defendant was in failing to supply a newer pattern of brake than the one in question. On the trial the plaintiff's own evidence was contradictory as to whether the new style of brake was any safer to use than the old one, although it appeared that the former was undoubtedly more effectual in stopping the train. *Held,* that there was no evidence of negligence to submit to the jury.

In the above case the plaintiff also claimed that the fracture of the brake in question had been caused by an inherent defect therein which had escaped the attention of the defendant's car-inspectors. In order to prove this he put the rim of a broken brake-wheel in evidence which purported to be the wheel in question. *Held*, that the evidence in the case was insufficient to identify the rim. *Held*, further, that the condition of such rim was not such as to warrant the jury in finding that the fracture thereof had been caused by a defect therein.

James F. Gluck for appellant.
John F. Murray for respondent.

FINCH, J.—The plaintiff asserted negligence on the part of the defendant which caused the injury for which he claimed damages, and to maintain that allegation endeavored to prove two propositions, either one of which, if established, would have entitled him to recover. These were that the brake-wheel which broke under his hand was of a defective and insufficient pattern, which fact was within the knowledge of the railroad company; and that it was weakened by an old break in the spokes which the inspectors of the defendant carelessly failed to discover, and with their negligence in not performing a duty which the master owed to his servants, the company was chargeable. Fuller *v.* Jewett, 80 N. Y. 46. If there is any evidence to sustain either of these propositions it was right to submit the case to the jury, and their verdict must control.

There was no evidence that the wheel was of an imperfect, or insufficient pattern. It was criticized in but a single particular, and that was its strength relatively to another pattern which had come later into more frequent use. Even in this single particular the plaintiff's evidence is contradictory, and leaves it more than doubtful which pattern was least liable to break in the use to which it was devoted, and the peculiar position in which it was placed. The older pattern, which broke under the force applied to it by the plaintiff, is described as having a flat rim and crooked spokes; while the later style had straight spokes and a round rim, and was of heavier metal. That it was inherently stronger is undoubtedly true, but that fact is immaterial, since it does not follow that it was stronger in its place and under the force to be applied, unless that force was the same in both cases. It is proved that it was not the same. All agree that the flat rim and crooked spokes made it impossible for the same brakeman to apply to it as much force as to the later pattern. The flat rim and crooked spokes prevented as firm a grasp, and the application of as great power as was exerted upon the round rim; and it was this peculiarity and this only of which the witness complained who stated his objections to the inspectors of the company. When he called the old pattern "unsafe" he evidently meant not unsafe to the individual brake-

man engaged in operating it, but unsafe as a means of promptly checking the speed of the train; since he explains his meaning by saying that in wet weather the hand slipped and a firm hold was impossible, while in dry weather "it did well enough." It must be remembered also that too great strength which involves heavier metal and a larger wheel may be itself as great an imprudence as too little strength. A wheel so made that it utilizes the extreme power of which the brakeman is capable presses the brake-shoe so closely upon the wheels as to make them slide, which flattens them by their movement along the rails, and so perils the safety of the whole train. It is obvious, therefore, that showing one pattern to be stronger than another by itself proves nothing. The weaker of the two may be strong enough, and the stronger of the two a mistake through its very strength. There is no evidence that the older pattern was not strong enough for the power which it ought to exert; on the contrary, its long and persistent use without evil results indicates a general fitness for its purpose, and the evidence in no manner shows that it had so failed in that general use as to make its retention negligence. Indeed, the proof does not at all establish that the new pattern was less liable to break than the older one; while it was stronger it was so made as to be subject to greater power and a more determined strain, and the plaintiff's own evidence leaves it wholly doubtful which pattern broke the most frequently. While the plaintiff himself swears that no one man, and no two men could break the later pattern, the very next witness whom he called testified to both patterns being broken and thrown into the scrap-heap, and that he had seen both broken; and the witness who complained of the old style as "unsafe" said the company replaced both kinds when broken, and added, "I have seen both kinds of wheels broken and have broken both kinds myself." Indeed he went much further than that for he said, "I have broken a wheel like this new pattern by setting the brake; I broke one going into Albion right through the hub. . . . It is very seldom these crooked spoke wheels are broken; that is all the one I know of except the one that was broken with the iron setting up the patent brake; I have known of a good many of the others being broken." The plaintiff next called the conductor of the train, who said on cross-examination that he always considered the old pattern a safe wheel to use and never heard it questioned. This was the plaintiff's case on this branch of it as he made it. His own opinion of the strength of the new pattern is completely neutralized by this testimony of all his witnesses who had knowledge on the subject; and even if we disregard that and take his own opinion as conclusive, it only shows that the new pattern was stronger and does not show that the old one was not strong enough for its purpose and its place, or at all defective or insufficient. There was thus a total failure to show any negligence of

the defendant growing out of the kind or pattern of the wheel. But the plaintiff further claimed a defect in the particular wheel which broke, of such a character that the defendant was negligent in not discovering and repairing it. For proof he produced on the witness-stand the rim of a wheel of the old pattern from which the spokes had been broken; swore it was the same rim which came off in his hand when he fell from the train; and pointed out what he said was true when he got the rim and he thought even then could be seen, that while two of the spokes showed a fresh fracture, the others were rusty and indicated an old break. The force of this evidence depends upon the identity of the rim. It was possible for anybody to pick up any number of broken wheels of either pattern which had rusty fractures, or new ones accidentally or purposely made. The rim produced was valueless as evidence unless shown by some evidence to be the identical wheel which occasioned plaintiff's injuries. In that respect the proof failed. It turned out that he knew nothing about it and could say no more than that the rim was of the same pattern with the one which broke. The accident happened near Holly. When the brakeman fell from the car he took the rim with him. He was thrown down an embankment and picked up by the train-men senseless and stunned. Nobody saw the broken rim. What became of it is utterly unknown. The plaintiff could not know for his condition prevented. Upon the mast or standard of the brake remained attached to the hub portions of the broken spokes. The same night, on the arrival of the train at Niagara Falls, Cathcart, who was car-inspector at that place, swears that he examined the broken wheel, and did so again the next morning by daylight; that he took the hub off with its fragments of spokes; and that the fracture appeared "pretty freshly broken," and he discovered no trace of rust, or indication of an old break. The plaintiff lay sick for about two months, and after he got out declares that he found in the possession of one Pierce, who was baggage-man at Holly, the rim which he produced on the trial. Pierce was not examined. The plaintiff said he did not know where he was, but showed no effort of any kind to find or account for him, and how the rim got into Pierce's possession, or where it came from is not disclosed. With the rim in his custody the plaintiff went back into the employ of the company. He remained there from April, 1872, to August, 1876, a period of over four years, serving as brakeman and baggage-man, and all the time keeping safe the broken rim; then when discharged, or leaving because assigned to a freight train, he brought this suit, produced the rim, and swore it was in the same condition as when he got it from Pierce, and showed as yet capable of being seen the fresh breaks on two spokes which had not yet grown old or rusty in four years, and on the other the original rust remaining unchanged. How utterly unable he was to iden-

tify the rim he tells us himself. He says, " know that is the wheel because it is the only one of the kind on the train that night. . . . I say this was the wheel because it was the only one of that pattern on that train that night. I have no other reason than that to say that is the wheel. . . . I couldn't say whether the wheel I took hold of had all the spokes in it sound or not of my personal knowledge. . . . The wheel was in the same condition it is now when I saw it in the hands of the baggage-man up at Holly, two months after; the breaks of two spokes were fresh, and the rest were rusty. . . . I have given the only reason I can give of that being the wheel. . . . I examined the wheels on that train that night and this was the only one of the kind, and that is the reason I think this was the one. There is no other reason." It is not even shown that the wheel was found down the embankment, near the scene of the accident. Such a fact would have been some evidence of identity. But it is found at Holly, in the baggage-room, some two months after. How it came there, and where it came from is pure matter of guess or speculation, and upon that guess, or speculation, this verdict hangs. And even that stands explicitly contradicted by the car-inspector who examined the remnant of the spokes remaining on the car, and by House who inspected the train at Rochester before its departure. And the proof fails in a further respect. Even if this was the identical rim, and was in fact found down the embankment near the scene of the accident, the jury could not know when it was found. It may have lain for days or weeks exposed to the weather, and have so fallen partly under the fence where plaintiff was found, or in such other place, that of all the fractures entirely fresh and new at first, only two escaped the effect of dampness and wet and the formation of rust. Even if found the next day after the accident we cannot know who found it, where it was kept, to what causes of rust fresh breaks had been exposed before the expiration of the two months when plaintiff got it at the baggage-room. So that there is no proof of any defect in the wheel, but on the contrary, such proof as identifies it negatives the presence of any old break. Now negligence is to be proved. The burden was on the plaintiff. That the wheel broke does not prove it. The best and most perfect wheel, exposed to the strain of holding a rapidly moving train, may break without any fault. The proof shows that both patterns often break, and so far as appears without negligence on the part of anyone. Proof was therefore required of an existing defect and none was furnished. The jury were permitted to guess that some one found the wheel at the scene of the accident before it had lain long enough to rust, and carried it to the baggage-room, and that it did not rust there during two months and so was then just as it fell from the car. A possibility is not proof. The doors to mistake or fraud are here left wide open, and very much in the con-

duct and testimony of the plaintiff warns us that rules of evidence and of the sufficiency of proof ought not to be strained to shelter his recovery. We think, therefore, no case was established against the defendant, and the motion made for a nonsuit, made at the close of the evidence should have been granted. That motion was put especially upon the ground, among others, that the plaintiff had failed to show any want of care or omission of duty which involved a liability, and after the charge of the court the precise questions intended to be raised were so stated as to draw to them the specific attention of the trial judge. He had submitted to the jury the inquiry whether the kind of wheel was sufficient for its purpose and proper and safe. The defendant specially excepted to this submission, and "claimed there is nothing to submit to the jury under the evidence as to whether the kind of wheel was safe or not; that the evidence is conclusive that it was." The defendant further asked the court to charge that "there is no evidence that the rim of the wheel produced is the one that was upon the car in question." The defects in the plaintiff's case were thus clearly pointed out and the proper exceptions taken.

The judgment should be reversed and a new trial granted; costs to abide the event.

All concur.

Duty of Railroad Company to Servants to furnish Improved Machinery.—A railroad company is bound to use reasonable care and diligence in providing for its servants improved forms of machinery. It is not, however, bound to nearly the same degree of care in this respect as to servants which it is bound to exercise as to passengers. Western, etc., v. Bishop, 50 Ga. 465; Wonder v. Balt., etc., R. R. Co., 32 Md. 41; Fort Wayne, etc., R. R. Co. v. Gildersleeve, 33 Mich. 133; Botsford v. Michigan S. R. Co., 33 Mich. 256; Devitt v. Pacific R. Co., 50 Mo. 302; Salters v. Delaware & H. C. Co., 3 Hun. 338; Stack v. Patterson, 6 Phila. 225; Lake Shore, etc., R. Co. v. McCormick, 5 Am. & Eng. R. R. Cas. 474; Louisville & N. R. Co. v. Orr, 8 Am. & Eng. R. R. Cas. 94; Umback v. Lake Shore & M. S. R. Co., 8 Am. & Eng. R. R. Cas. 98; McGinnis v. Canada & S. R. Co., 8 Am. & Eng. R. R. Cas. 135.

In some courts the company is held to almost as strict a rule of liability in this respect as to servants as it is to passengers.—St. Louis, etc., R. Co. v. Valerius, 56 Ind. 511.

As to the duty of the company where it introduces without special warning to its servants machinery of a new pattern the use of which involves special danger. See O'Neil v. St. Louis, etc., R. Co., 6 Am. & Eng. R. R. Cas. 614; Hathaway v. Michigan Central R. Co., 12 Am. & Eng. R. R. Cas. 249.

Defective Brakes.—As to injuries to servants occasioned by defective brakes. See Columbus & Xenia R. R. Co. v. Well's Adm., 12 Ohio St. 475; Illinois Central R. R. Co. v. Jewell, 46 Ill. 99; Chicago & N. W. R. Co. v. Taylor, 69 Ill. 461; Wonder v. Baltimore & Ohio R. R. Co., 32 Md. 411; Henry v. Staten Island R. Co., 2 Am. & Eng. R. R. Cas. 60; Painton v. Northern Central R. R. Co., 5 Am. & Eng. R. R. Cas. 454; Herbert v. Northern Pac. R. Co., 8 Am. & Eng. R. R. Cas. 85; Leahy v. Southern Pac. R. Co., supra. Cf. Costello v. Syracuse, etc., R. Co., 65 Barb. 92; Oldfield v.

N. Y. & Harlem R. R. Co., 3 E. D. Smith, 103; s. c. 14 N. Y. 310; Owen et. al. *v.* Hudson River R. R. Co., 7 Bosw. 329; New York, L. E. & W. R. R. Co., 6 Am. & Eng. R. R. Cas. 139.

Richmond and D. R. R.

v.

Moore's Adm'r.

(*Advance Case, Virginia. December* 6, 1883.)

Virginia the rule is to allow either party to demur to the evidence, unless the case be clearly against the party offering the demurrer, or the court is in doubt what facts should be reasonably inferred from the evidence demurred to.

By a demurrer in evidence the demurrant must be considered as admitting all that could be reasonably inferred by a jury from the evidence of his adversary, and as waiving all his own evidence which contradicts that of his adversary, or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it.

M. was a freight conductor on the R. & D. R. R. In a train which he commanded on the 24th of September, 1879, en route from Greensboro to Richmond, was a freight car, the ladder of which was out of repair; the "handle" or "standard" at the top of this ladder was broken off, and had been so long enough for the break to become weather-worn, and present the appearance of an old fracture. This car is supposed to have been taken into the train during the night at Burkeville. The next morning about sunrise, at Powhatan Station, M., in attempting to descend this ladder, fell and was killed by the cars. It was in evidence that M., turning to face the ladder in descending, caught at the "handle," and would have caught it if it had been in place. There was conflict in the evidence as to M.'s condition, and as to his recklessness and careless manner in descending the ladder. In an action brought by M.'s administrator the defendant demurred to the evidence. *Held:*

1. The company was guilty of negligence in allowing the car to remain out of repair, and this negligence was the cause of the accident, and the company is liable in damages for the killing.

2. Under the rules governing the case, M. must be held not guilty of contributory negligence.

Error to the Circuit Court of Powhatan.

Trespass on the case by R. C. C. Moore, administrator of R. V. Moore, deceased, against the Richmond & Danville R. R. Co., to recover damages for the killing of the said R. V. Moore, a freight conductor on the said railroad, through the negligence of the said company. Verdict and judgment for the plaintiff. The defendant obtained this writ.

The facts are sufficiently stated in the opinion.

Marshall, Hubard & H. Taylor, Jr. for the plaintiff in error.

Carrington & Fitzhugh, Irving & McKinney & Dance for the defendant in error.

LACY, J.—The action was brought by the defendant in error for damages, to be recovered against the said company for carelessly and negligently permitting one of the freight cars of the train commanded by the said conductor to remain out of repair, by which the said conductor was thrown from the moving train and crushed under the wheels of a car and killed.

Upon the trial of the case, after all the evidence was in and reduced to writing, the defendant in the Circuit Court demurred to the plaintiff's evidence, in which the plaintiff joined, and the jury rendered a verdict for the same of $9000, subject to the opinion and judgment of the court upon said demurrer; the Circuit Court overruled the said demurrer and gave judgment for the said plaintiff.

The plaintiff in error contends that the Circuit Court erred in overruling the said demurrer, and giving judgment for the defendant in error; that the said demurrer should have been sustained and judgment given for the defendant in the Circuit Court. That the accident was not caused by the negligence of the company, but was the result of contributory negligence on the part of the conductor. That he was laboring under much excitement, and was to a great degree reckless and incautious, without which he would have been in no danger of losing his life.

Whether the injury was caused by the negligence of the company or by the negligent conduct and deportment of the conductor can be determined only from a consideration of the evidence, as it must be considered in this court, upon the authority of many cases decided here.

In this case, as we have observed, there was a demurrer to the evidence upon which the case was decided.

Upon the demurrer to the evidence the practice is, in Virginia, where it has been sanctioned by repeated decisions of this court, to allow either party to demur, unless the case be clearly against the party offering the demurrer, or the court should doubt what facts should be reasonably inferred from the evidence demurred to, in which case the jury is the most fit tribunal to decide; to put all the evidence on both sides into the demurrer, and then to consider the demurrer as if the demurrant had admitted all that could reasonably be inferred by a jury from the evidence given by the other party, and waived all the evidence on his part which contradicts that offered by the other party, or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it.

With these limitations the party whose evidence is demurred to has all the benefit of the ancient practice which it was intended to give him, without subjecting the other party to its inconveniences; and no disputed fact is taken from the jury and referred to the court.

The former practice was to require the party demurring to admit upon the record the existence of all the facts which the evidence offered by the other party conduced to prove, and those facts were to be ascertained by the court. Whatever may be the comparative merits of the old and the later rule, about which there has been among the judges some difference of opinion, the rule now stated above is well settled, and nowhere in our courts is it now controverted. "In ascertaining the facts proved directly or by inference, we must not be unmindful of the effects of a demurrer to evidence. By it the demurrant allows full credit to the evidence offered by the demurree, and admits all the facts directly proved by, or that a jury might fairly infer from, the evidence; and in determining the facts inferable, inferences most favorable to the demurree will be made, in case where there is a grave doubt which of two inferences shall be deduced. In such cases it would not be sufficient that the mind of the court should incline to the inference favorable to the demurrant, to justify it in making that inference the ground of its judgment. Unless there be a decided preponderance of probability or reason against the inferences that might be made in favor of the demurree, such inference ought to be made. The demurrer withdraws from the jury, the proper triers of facts, the consideration of the evidence by which they are to be ascertained, and the party whose evidence is thus withdrawn from its proper forum is entitled to have it most benignly interpreted by the substitute. He ought to have all the benefit that might have resulted from a decision of the case by the proper forum.

"If the facts of the case depend upon circumstantial evidence, or inferences from facts or circumstances in proof, the verdict of a jury ascertaining these facts would not be set aside merely because the court might have made inferences different from those made by the jury. To justify the grant of a new trial, when it depends on the correctness of the decision between different inferences to be drawn from the evidence, it would not suffice that in a doubtful case the court would have made a different inference. The preponderance of argument or probability in favor of this different inference should be manifest. When a question is whether or no a fact ought to be taken as established by the evidence, either directly or inferentially in favor of the demurree, I do not know a juster test than would be furnished by the enquiry, Would the court set aside the verdict had the jury in the evidence found the fact? If the verdict so finding the fact would not be set aside, it ought to be considered as established by the evidence demurred to." See opinion of Stanard, J., in Ware *v.* Stephenson, 10 Leigh, 155.

We think the views thus announced are sound and ought to govern in cases of demurrer to evidence. See opinion of Moncure, P., in Trout *v.* The Va. & Tenn. R. R. Co., 23 Gratt. 619; see Tutt

v. Slaughter's adm'r, 5 Gratt., 364; Green v. Judith, 5 Rand. 1; Hansborough's ex'ors v. Thorn, 3 Leigh, 147; Stevens v. White, 2 Wash., 203, 210; Union Steamship Co. v. Nottingham, 17 Gratt. 115.

These cases show how great a risk a demurrant to evidence runs. So great is this risk that it seems the defendant in Green v. Judith, supra, lost his cause by demurring to the evidence. Trout v. Va. & Tenn. R. R. Co., supra.

In this case it is clearly proved that the demurrant below used a freight car in the train in question, from which one of the safeguards which belonged to it had been broken. The handle at the top of the ladder fixed against the car in order to ascend to the top of it had been broken off, and had been so broken off long enough to be weather beaten and to appear as an old break. The conductor who was killed fell from this ladder in attempting to descend it. A witness whose testimony is admitted to be true by the demurrer says he saw the conductor commence the descent of this ladder, and that turning he attempted to grasp this handle, but the handle being off he failed to catch it, and his hand came down on the car top and edge, and so he fell. Witness says he saw that the conductor would have caught the handle if it had been there. If this testimony is to be admitted we must consider the fact of the negligence of the demurrant, and the fact that it caused the fall of the conductor, as established. Is there any evidence in the record which we can consider which established the fact of contributory negligence on the part of the conductor which to any degree brought on his misfortune?

It is not established that he was drunk; by the demurrer all that is put out of the case, and he must be held to have been sober. It is not proven that this defect in the car was known to the conductor; we are left to the inference that the car was put on the train at Burkeville in the night, and the conductor was killed at Powhatan Station about sunrise, and did not leave the caboose or conductor's car until close to Powhatan Station. In this case there is a good deal of conflict in the testimony, especially as to the alleged contributory negligence; but if we adhere to the rules cited above, which govern the consideration of a demurrer to evidence, and take all as admitted which can reasonably be inferred from the evidence of the demurree, reject or consider as waived all the evidence of the demurrant which contradicts that offered by the demurree, or the credit of which is impeached, and reject all inferences from the demurrant's evidence which do not necessarily flow from it, we are confined to very narrow limits. The result is that the negligence of the company is proved, and the fact that such negligence and that alone caused the accident in question, and that the conductor was in his usual condition, and contributed in no way to the accident by his own misconduct.

The two cases of the Richmond & Danville R. R. Co. *v.* Morris, and the same company *v.* Anderson, both reported in the 31 vol. of Gratt. Rep., state the doctrine of contributory negligence, and in each the judgment of the lower court was reversed. We have carefully examined those cases and the authorities there cited, and the views herein are, we think, in accord with the opinion of the court in each of those cases. They turned upon the question whether the injury complained of was caused solely by the negligence of the company, or by the negligence of the plaintiff concurring with that of the defendant; in other words, whether there was contributory negligence on the part of the plaintiff. This contributory negligence was found to exist in each case, and it was held that a plaintiff cannot recover in an action for negligence if it is found that he has been guilty of any negligence or want of ordinary care which contributed to cause the accident, unless the defendant could by the exercise of ordinary diligence have avoided the accident. In this case we are compelled to hold under the plaintiff's evidence that the accident was caused by the broken ladder, and that the defendant in error did not by any reckless misconduct of his bring about the accident; and must hold there is no error in the judgment of the Circuit Court, and the same must be affirmed. Judgment affirmed.

Ladders.—As to injuries from defective ladders on freight cars the reader is referred to the following authorities: Chicago, etc. R. R. Co. *v.* Jackson, 55 Ill. 492; Ballou *v.* Chicago & N. W. R. Co., 5 Am. & Eng. R. R. Cas. 480.

RANDALL
v.
BALTIMORE AND O. R. R. Co.

(*Advance Case, Supreme Court of the U. S. December* 10, 1883.)

When the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant.

A ground switch, of a form in common use, was placed in a railroad yard, in a space six feet wide between two tracks; the lock of the switch was in the middle of the space; and the handle, when lying flat, extended to within a foot of the adjacent rail, and could be safely and effectively worked by standing in the middle opposite the lock, using reasonable care. The brakeman of a train on one of the tracks, while working at the switch, standing at the end of the handle, was struck by an engine on the other track. *Held*, that there was no such proof of fault on the part of the railroad corporation, in the construction and arrangement of the switch, as would support an action against it for the injury.

A brakeman, working a switch for his train on one track in a railroad yard, is a fellow-servant with the engineman of another train of the same corporation upon an adjacent track, and cannot maintain an action against the corporation for an injury caused by the negligence of the engineman in driving his engine too fast, and not giving due notice of its approach, without proving negligence of the corporation in the employing an unfit engineman.

A statute which provides that a bell or whistle shall be placed on every locomotive engine, and shall be rung or sounded by the engineman or fireman 60 rods from any highway crossing, and until the highway is reached, and that the "corporation owning the railroad shall be liable to any person injured for all damages sustained" by reason of neglect so to do, does not make the corporation liable for an injury, caused by negligence of the engineman or fireman in this respect, to a fellow-servant.

In error to the Circuit Court of the United States for the District of West Virginia.

B. B. Dovener for plaintiff in error.

John K. Cowen and C. Boggess for defendant in error.

Gray, J.—This is an action against a railroad corporation, by a brakeman in its employ, for personal injuries received, while working a switch, by being struck by one of its locomotive engines. The declaration, in seven different counts, alleged as grounds of action that the defendant negligently constructed and kept its tracks and switches in a defective and dangerous condition; that the defendant, by one of its agents and servants, who was at the time unskillful, negligent, and unfit to perform the business and employment that he was engaged by the defendant to perform, and who was engaged in a service for the defendant other and different from the service in which the plaintiff was engaged, and whose negligence, unskillfulness, and unfitness were known to the defendant, negligently propelled one of its locomotive engines against and over the plaintiff; that this was done without sounding any whistle or ringing any bell, as required by the laws of the state of West Virginia; and that the defendant neglected proper precautions in the selection and employment of its agents and servants. A statute of West Virginia provides that "a bell or steam-whistle shall be placed on each locomotive engine, which shall be rung or whistled by the engineer or fireman at the distance of at least sixty rods from the place where the railroad crosses any public street or highway, and be kept ringing or whistling until such street or highway is reached," under a penalty of not exceeding $100 for each neglect; and that "the corporation owning the railroad shall be liable to any person injured for all damages sustained by reason of such neglect." St. W. Va. 1873, c. 88, § 31.

As we understand the evidence introduced at the trial, it conclusively proved the following facts: The injury occurred at night, at a place where, as the plaintiff himself testified, "there was one net-work of tracks," in the defendant's railroad yard, near the junction of a branch road with the main road, and about 10 rods from a

highway crossing. The plaintiff had previously been employed on another part of the road. On the night in question, in the performance of his duty as a brakeman on a freight train, he unlocked a switch which enabled his train to pass from one track to another; and he was stooping down, with his lantern on the ground beside him, to unlock the ball of a second switch to let the engine of his train pass to a third track, when he was struck and injured by the tender of another freight engine, in no way connected with his train, backing down on the second track. The tender projected 10 inches beyond the rail. The distance between the adjacent rails of the second and third tracks was about six feet. The second switch was a ground switch of a kind in common use, the lock of which was in the centre of the space between the two tracks; and the handle of which was about two feet long, and when lying flat extended towards either track, and when thrown one way opened the switch, and when thrown the other way closed it. The switch could be worked efficiently and safely by a man standing midway between the two tracks, using reasonable care. It could not be safely worked by standing at the end of the handle while an engine was coming on the track next that end. Upright switches could not be used, at a place where the tracks were so near together, without seriously interfering with the moving and management of the trains. The plaintiff testified that he had never worked a ground switch before, and that the first switch was an upright switch. But he admitted on cross examination that the two kinds of switches were unlocked in the same manner, and the other evidence established beyond doubt that the first switch was also a ground switch. A single witness, who had been a brakeman, called for the plaintiff, in answer to a question, often repeated, of his counsel, whether that was a safe and proper switch to be used at that point, testified that he could not say it was a very safe place at that time there; that he thought that was not a proper kind of switch, and an upright switch would have been more convenient to handle; that he did not think it was a very safe ball there; that he thought it was a safe ball there; and that it could not be unlocked without danger while an engine or train was coming upon the other track. The engine which struck the plaintiff was being driven at a speed of about 12 miles an hour, by an engineman in the defendant's employ, and there was evidence tending to show that it had no light except the head-light, and no bell, and that its whistle was not sounded. There was no evidence that the tracks were improperly constructed, or that the engineman was unfit for his duty. The other grounds of action relied on were, improper construction and arrangement of the switch; negligence of the defendant in running its engine by an unskillful and negligent engineman, alleged to have been engaged in a different service for the defendant from that in which the plaintiff was engaged; and omission to

comply with the requirements of the statute of West Virginia. At the close of the whole evidence (of which all that is material is above stated) the court directed the jury to return a verdict for the defendant, because the evidence was such that if a verdict should be returned for the plaintff the court would be compelled to set it aside. A verdict for the defendant was accordingly returned, and the plaintiff sued out this writ of error.

It is the settled law of this court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. Pleasants *v.* Fant, 22 Wall. 116; Herbert *v.* Butler, 97 U. S. 319; Bowditch *v.* Boston, 101 U. S. 16; Griggs *v.* Houston, 104 U. S. 553. And it has recently been decided by the house of lords, upon careful consideration of the previous cases in England, that it is for the judge to say whether any facts have been established by sufficient evidence from which negligence can be reasonably and legitimately inferred; and it is for the jury to say whether from those facts, when submitted to them, negligence ought to be inferred. Metropolitan Ry. Co. *v.* Jackson, 3 App. Cas. 193.

Tried by this test, there was no sufficient evidence of any negligence on the part of the railroad company, in the construction and arrangement of the switch, to warrant a verdict for the plaintiff on that ground. The testimony of the plaintiff and of his witness was too slight. A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad corporation, in any work connected with the making up or moving of trains, assumes the risks of that condition of things. Although it was night, and the plaintiff had not been in this yard before, his lantern afforded the means of perceiving the arrangement of the switch and the position of the adjacent tracks. The switch was of a form in common use, and was, to say the least, quite as fit for its place and purpose as an upright switch would have been. It could have been safely and efficiently worked by standing opposite the lock, midway between the tracks, using reasonable care; and it was unnecessary, in order to work it, to stand, as the plaintiff did, at the end of the handle, next the adjacent track.

The general rule of law is now firmly established, that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of the employment. This court has not hitherto had occasion to decide who are fellow-servants, within the rule. In Packet Co. *v.* McCue, 17 Wall. 508, and in Railroad Co. *v.* Fort, Id. 553, the plaintiff maintained his action because at the time of the injury he

was not acting under his contract of service with the defendant. In the one case, he had wholly ceased to be the defendant's servant; in the other, being a minor, he was performing, by direction of his superior, work outside of and disconnected with the contract which his father had made for him with the defendant. In Hough *v.* Ry. Co. 100 U. S. 213, and in Wabash Ry. Co. *v.* McDaniels, 107 U. S. 454 (s. c., 11 Am. & Eng. R. R. Cas. 158) the action was for the fault of the master, either in providing an unsafe engine, or in employing unfit servants.

Nor is it necessary for the purposes of this case to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh the conflicting views which have prevailed in the courts of the several states, because persons standing in such a relation to one another as did this plaintiff and the engineman of the other train, are fellow-servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the House of Lords, and in the English and Irish courts. They are employed and paid by the same master. The duties of the two bring them to work at the same place, at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object—the moving of the trains. Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action for an injury caused by such negligence against the corporation, their common master.

The only cases cited by the plaintiff, which have any tendency to support the opposite conclusion, are the decisions of the supreme court of Wisconsin in Chamberlain *v.* Milwaukee & M. R. R. Co., 11 Wis. 248, and of the supreme court of Tennessee in Haynes *v.* East Tennessee & G. R. Co., 3 Cold. 222, each of which wholly rejects the doctrine of the master's exemption from liability to one servant for the negligence of another, and the first of which has been overruled by the later cases in the same state. This action cannot therefore be maintained for the negligence of the engineman in running his engine too fast, or in not giving due notice of its approach.

The statute of West Virginia on which the plaintiff relies, has no application to this case. There is no evidence that the engine which struck the plaintiff was about to cross a highway; and the main, if not the sole, object of the statute evidently was to protect travelers on the highway. O'Donnell *v.* Providence & W. R. Co., 6 R. I. 211; Harty *v.* Cent. R. Co., 42 N. Y. 468. It may, perhaps, include passengers on the trains, or strangers, not trespassers, on the line of the road. But it does not supersede the general rule

of law which exempts the corporation from liability to its own servants for the fault of their fellow-servants.

Judgment affirmed.

Duty of Railroad Company to its Servants in Regard to Switches.—A railroad company is bound to provide for its servants reasonably safe and sufficient switches. Chicago & N. W. R. Co. v. Taylor, 69 Ill. 461; Piper v. N. Y. Central R. R. Co., 56 N. Y. 630.

Generally where a servant is injured through the fault of the switchman, this is considered to be the negligence of a fellow-servant for which a railroad company is not liable. Bauler v. N. Y. & Harlem R. R. Co., 62 Barb. 423; Farwell v. Bost. & Worcester R. R. Corp. 4 Metc. 49; Slattery's Admr. v. Toledo & Wabash R. Co., 23 Ind. 81; Tinney v. Boston & Albany R. Co., 62 Barb. 218; Walker v. Boston & Me. R. R. Co., 1 Am. & Eng. R. R. Cas. 141; Gilman v. Eastern R. Corp., 13 Allen, 433; Sammon v. New York & Harlem R. R. Co., 62 N. Y. 251.

In regard to injuries from defective switches see generally, Walker v. Boston & Me. R. R. Co., 1 Am. & Eng. R. R. Cas. 141; Waldhier v. Hannibal & St. Joe R. Co., 2 Am. & Eng. R. R. Cas. 146; Edens v. Hannibal & St. Joe R. Co., 5 Am. & Eng. R. R. Cas. 459; Lake Shore & M. S. R. Co. v. McCormick, 5 Am. & Eng. R. R. Cas. 474; New York, etc., R. Co. v. Daugherty, 6 Am. & Eng. R. R. Cas. 139; McGinnis v. Canada S. R. Co., 8 Am. & Eng. R. R. Cas. 135; Harvey v. N. Y. C. & H. R. R. Co., 8 Am. & Eng. R. R. Cas. 515; Mayer v. Chicago, R. I. & P. R. Co., 8 Am. & Eng. R. R. Cas. 527.

Brakeman at Switch and Engineer are Fellow-Servants.—Upon this point, see the following authorities: Holden v. Fitchburg R. Co., 129 Mass. 268; Coon v. Syracuse & U. R. Co., 5 N. Y. 492; Wright v. N. Y. Cent. R. Co., 25 N. Y. 562; Besel v. N. Y. Cent., etc., R. Co., 70 N. Y. 171; Slater v. Jewett, 5 Am. & Eng. R. R. Cas. 515; McAndrews v. Burns, 10 Vroom, 117; Smith v. Oxford Iron Co., 13 Vroom, 467; Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432; Whaalan v. Mad River R. Co., 8 Ohio St. 249; Pittsburgh, F. W. & C. Ry. Co. v. Devinney, 17 Ohio St. 197; Smith v. Potter, 46 Mich. 158; Mosely v. Chamberlin, 18 Wis. 731; Cooper v. Milwaukee & Prairie du Chien Ry. Co., 23 Wis. 668; Sullivan v. Mississippi & M. R. Co., 11 Iowa, 421; Peterson v. Whitebreast Coal & M. Co., 50 Iowa, 673; Foster v. Minnesota Cent. R. Co., 14 Minn. 360 (Gil. 277); Ponton v. Wilmington & W. R. Co., 6 Jones, Law, (N. C.) 245; Louisville R. Co. v. Robinson, 4 Bush, 507; Mobile & M. Ry. Co. v. Smith, 59 Ala. 245; Hogan v. Cent. Pac. R. Co., 49 Cal. 128; Kielley v. Belcher Mining Co., 3 Sawy. 500; Hutchinson v. York, N. & B. Ry. Co. 5 Exch. 343; Bartonshill Coal Co. v. Reid, 3 Macq. 266; Bartonshill Coal Co. v. McGuire, Id. 300; Wilson v. Merry, L. R., 1 H. L. S. C. App. Cas. 326; Morgan v. Vale of Neath Ry. Co., 5 Best & S. 570, 736; s. c., L. R. 1 Q. B. 149; Tunney v. Midland Ry. Co., L. R., 1 C. P. 291; Charles v. Taylor, 3 C P. Div. 491; Conway v. Belfast & N. C. Ry. Co. Ir. R. 9 C. L. 498, and Ir. R. 11 C. L. 345.

VOSBURG
v.
LAKE SHORE AND MICHIGAN SOUTHERN R. R. CO.

(*Advance Case, New York.* 1884.)

Where one railroad company buys from another its road, including a completed bridge, it owes to its servants operating the road the duty not only of maintaining the bridge in as good repair as when it was acquired, but also of repairing and supplying all patent defects in its original construction. If it fails to perform this latter duty, and an injury is occasioned to a servant in consequence by reason of such patent defect, the company is liable in damages.

James F. Gluck for appellant.
Adelbert Moot for respondent.

FINCH, J.—The plaintiff was a brakeman in the employ of the defendant company, and was injured by the fall of the bridge at Ashtabula on the 29th of December, 1876. He has recovered a judgment for damages, which is now sought to be reversed upon the ground that there was no sufficient proof of negligence to carry the case to the jury. The bridge was built of iron, and spanned a gulf leading inland from the lake, and growing narrower as it approached the point of crossing. It was a deck bridge, constructed upon what is known as the Howe truss plan, frequently applied in the building of wooden bridges, but apparently in this one instance alone made wholly of iron. It was originally constructed in 1864, by the Cleveland, Painesville & Ashtabula R. R. Co., a predecessor of the present defendant. The history of the construction is not encouraging. The superstructure was planned by Amasa Stone, who appears to have had a large experience in the designing and construction of railroad bridges, and at the time was president of the company for which the bridge was to be erected. Stone, however, merely "directed the method of making the plans," "and the method of carrying it out," "in general terms through agents and practical employees." He employed one Tomlinson "to make the design and draft of the structure and the specifications and details." With reference to his capacity, Stone says only that he had been in his employ for about fifteen years, "more or less in the erection of some bridges," and that he regarded him as competent to execute the work under his, Stone's "general directions." But Tomlinson evidently bungled his work, making the top chords too short, and planning to put in the braces with their webs horizontal instead of vertical; errors which so "annoyed" Stone, that he "intimated to him that his resignation would be accepted, and put

another man in charge." Who that was, and what may have been his capacity, we are not informed. These errors had to be corrected. In doing it, the top chords were elongated by inserting between their members thin plates of iron, called shim pieces, held in their places merely by the dead weight of the bridge and the loads upon it; the office of the top chords and the braces under them being mainly to resist compression. When the position of the braces was altered, a few more were added, and this change compelled the chipping away of the lugs on the angle blocks, in order to give the braces a fair bearing; and then some of them, crowded by the vertical rods, did not rest fully upon the angle blocks. The iron work for the bridge was done by Congdon, whose principal business appears to have been the construction and repair of locomotives, and who held the position of master-mechanic. The superstructure was put together and erected by one Rogers, who was a carpenter. The result which followed was not surprising. The bridge was put in its place and its members united by the aid of bents built up from the ground below, and when the blocks upon them were removed, the bridge sagged below a horizontal line. That occurred twice. The difficulty was sought to be remedied the first time by the lengthening of the top chords, which proved ineffectual, and the second time by the change in the braces. After that the top chords seem to have preserved their camber of two and one half inches, and the bridge went into use, at first with a single track and later with a double track, and stood for about ten years, until its fall in 1876.

Upon all these questions of original plan and construction, experts were examined. Their opinions differed, as is very common in such cases. But upon two things they agreed. Nobody disputed the mechanical axiom, that the strength of a bridge is that of its weakest part; nor the rule of prudence, that its factor of safety should have been five, when, in truth, it was only about three; that is, the bridge should have been five times as strong as its breaking weight under expected loads, but was only of about three times that strength. As to other alleged defects—in the yoking of the mainbraces, so that each I beam acted independently instead of solidly as one; in the insufficiency of the lateral bracing, and the alleged movement or change of position of the braces upon the anchor locks—there was much difference of opinion and considerable contradiction in the evidence.

Enough has been said to indicate the questions of fact existing in the case, unless it be true that the defendant company was not responsible for any of the alleged defects, because it acquired the bridge by purchase, as a completed and to some extent as a tested structure. In other words, the contention is, that a railroad company acquiring by purchase an additional line already built and in operation, of which an existing bridge forms a part, owes no obli-

gation to its employees running trains over such bridge, except to keep it as good as when it was bought, and has a right, without negligence, to assume the sufficiency of its original plan and construction. The case relied upon for this doctrine is Devlin *v.* Smith, 89 N. Y. 470; but it has no application, for two reasons. Smith, having no knowledge of scaffold-building, employed a builder known to him to be skillful and experienced, and owed to no one a duty of inspection, the proper performance of which would have disclosed the defect. The defendant here bought the bridge of another railroad company, and without any selection or choice of the builder. If Smith had found the scaffold already built and in the ownership of a person not an expert or scaffold-builder, and had bought it of such third person without knowing who designed it, or the plan and manner of its construction, and without inspection had sent his men upon it, a very different question would have been presented. And if the scaffold instead of a temporary had been a permanent structure, intended for continuous use through the years, and imposing upon Smith the duty of an inspection by skillful and competent agents, whose proper performance of that duty would have disclosed defects of construction which made it dangerous and unsafe, again a different question would have been presented. Assuming, as we must, what the jury could have found from the evidence that the bridge when purchased was unsafe and dangerous by reason of defects in its original plan and construction, and which defects were obvious to the eye of a skillful inspector, and easily and surely ascertainable by a structural analysis determining its factor of safety, it was negligence on the part of the defendant to continue its use in the face of such obvious defects, without ascertaining their effect upon its strength and capacity. The purchasing company either knew or did not know the facts relating to its original construction. It is probable that they knew them. Their chief engineer, Collins, whose duty it was to inspect this bridge, and who did so, was the engineer of the constructing company. He built the abutments of this very bridge, and in all probability knew that the general plan was dictated by a man busy about everything else; that its draftsman and actual designer made mistakes, and was discharged because of them; that the man who put it up was a carpenter, without experience in iron bridges; and that the structure was altered and modified twice before it would bear its own weight. If the defendant company, through its chief engineer, knew this, it knew enough to be guilty of negligence if it relied upon such a plan and construction without further investigation, and in sole reliance upon the fact that it had not yet fallen. But if the company did not know it, if it bought the bridge in ignorance of who built it, and the character and safety of its plan, and used and inspected it without even knowing or ascertaining its factor of safety, or the pru-

dence of its design, although warned by the presence of obvious defects, they simply shut their eyes and took the risk, on the sole faith of its previous use. Collins is said to have been a competent man. Year after year he examined this bridge, but always on the assumption that his sole duty was to see that everything was in place, and that no signs of weakness were developed by the test of passing trains, and never once to ascertain the safety of its plan and design. The defects pointed out by the evidence were almost all obvious to the eye of a competent examiner. A structural analysis, easily made by such an examiner, would have shown that instead of a factor of safety of six times its breaking weight, as Stone says he intended, it had but half that strength, and was far below the ordinary standard of safety.

The learned counsel for the appellant insists that the defendant did employ suitable and competent persons to inspect the bridge, who did make the usual and customary examinations, and that there is no dispute about that in the evidence. But it is plain that the inspection described in the proofs as customary is that made by a company which has built its own bridges. In such case it already knows the plan and mode of construction, and is already responsible for the lack of reasonable care in either the design or its execution. The subsequent inspection is directed only to its perfect repair and to indications of weakness. But where the company does not know either the safety of the plan or the prudence of the construction, because it has purchased it completed and in use, and knows nothing of the skill or want of skill of the builder, an inspection which takes no heed of that inquiry when defects are obvious and lack of safety is indicated and may be easily ascertained, is not sufficient. The employer must exercise reasonable care in furnishing the servant with the means and implements of his service. That the master does not do when he buys an unsafe and defective bridge, whose obvious deficiencies give warning of possible danger, and sends his servants upon it without inquiry as to the skill of its construction or safety of its design. The servant is entitled to that care whether the master builds the bridge or buys it. The risk and the injury are the same in either case. Of course the test of actual previous use goes for something. It might justify a continuance of that use until a competent inspection could reasonably be made, but would not justify a neglect when it was made to observe and remedy obvious defects and elements of danger because existing in the original plan, and an omission to learn by a well understood process whether in view of its apparent defects it had the ordinary surplus of strength. Upon railroad bridges every day and almost every hour the lives of passengers and of employees are trusted. It is not requiring too much to insist that, whether built or purchased, the company shall take reasonable care to know or ascertain the safety of its design and con-

struction, and shall be charged with knowledge of defects which a competent examination would have disclosed.

It is apparent, therefore, that in this case there were questions of fact for a jury. Whether the bridge was in truth defective in particulars, not latent or undiscoverable, but open and obvious to the eye of a skilled and faithful inspector; and whether that inspector did make such an examination as reasonable care required and the company should have exacted in the exercise of such care under the existing circumstances, and in view of such obvious and apparent defects, were questions of fact in the case, and properly submitted to the jury.

The judgment should be affirmed with costs.

All concur except Andrews, J., taking no part.

Bridges.—As to the liability of a railroad company for causing the death of its servants by reason of the insufficient construction of its bridges, see Warner *v.* Erie R. Co., 39 N. Y. 468; Faulkner *v.* Erie R. Co., 49 Barb. 324; Toledo, P. & W. R. Co. *v.* Conroy, 68 Ill. 560; Harrison *v.* Central R. Co., 2 Vroom (N. J.), 293; McDermott *v.* Pacific R. Co., 30 Mo. 115; Brothers *v.* Carter, 52 Mo. 372; Mansfield Coal & Coke Co. *v.* McEnery, 37 Leg. Int. (Penna.) 28. See Ballou *v.* Chicago, etc., R. Co 5 Am. & Eng. R. R. Cas. 480.

YEATON

v.

BOSTON AND LOWELL R. R. CORPORATION.

(135 *Massachusetts Reports*, 418.)

A., a person forty-five years of age, entered the employ of a railroad corporation as a brakeman, having previously had some experience in that kind of work. He was placed at work in a yard of the corporation upon a switching engine, which was used to change cars about the yard and to make up trains. He, with others, was in the habit of taking cars which had been damaged and putting them upon a certain track in the yard two or three times a week. After working a few weeks, he was injured by reason of a broken brake on a car. Whenever there had been damaged cars to be moved, during his employ, his attention had been called to the fact by the yard-master, who usually told the men that the cars had been damaged, and that he wanted them put on a track indicated. They could usually tell a damaged car by its appearance. A. was sometimes accustomed to examine to see if cars were damaged; and he looked at the car in question, with others, on the day of the accident, but saw nothing out of order about it. *Held*, in an action by A. against the corporation, that the injury was caused by one of the risks assumed by him in his employment; and that the action could not be maintained.

TORT for personal injuries received by the plaintiff while in the defendant's employ as a brakeman. At the trial in the Superior Court, before Blodgett, J., the jury returned a verdict for the

This is not like a case where dangerous or defective machinery is supplied by a master for a servant to use in his work, and where notice of such danger or defect ought to be given. But it is a case where the material to be handled and to be worked upon is understood to involve risk and the necessity of care. There was no negligence on the part of the defendant in sending broken cars for repairs to the yard where the plaintiff was at work. This was a proper place for them. There was no negligence in omitting to give notice to the plaintiff that broken cars were to be sent to this yard for repairs, and that his employment included the duty of handling and moving them. All this he knew already. What he did not know was, that this particular car was broken, and that broken cars which were sent for repairs might be found in that part of the yard where this car was. While not disposed to relax the strictness of the rule which requires a master to give fair and reasonable information and instruction, to a young, ignorant, or inexperienced servant, as to the perils incident to his employment, we cannot find any warrant, either on principle or on authority, for extending it to a case like the present. Upon the undisputed facts, the risk was one which the law cast upon the plaintiff. See Dynen *v.* Leach, 26 L. J. (N. S.) Ex. 221; Chicago & Northwestern R. R. *v.* Ward, 61 Ill. 130; Flannagan *v.* Chicago & Northwestern Ry., 50 Wis. 462; s. c., 2 Am. & Eng. R. R. Cas. 150; Holden *v.* Fitchburg R. R., 129 Mass. 268.

Exceptions sustained.

Defective Cars.—As to injuries to servants of a railroad company while employed in moving damaged or defective cars see Chicago & N. W. R. Co. *v.* Ward, 61 Ill. 130; Flannagan *v.* Chicago & N. W. R. Co., 2 Am. & Eng. R. R. Cas. 150; Watson *v.* R. R. Co., 11 Am. & Eng. R. R. Cas. 213; Fraker *v.* St. Paul, M. & M. R. Co., infra.

FRAKER

v.

ST. PAUL, M. AND M. RY. CO.

(*Advance Case, Minnesota. April* 24, 1884.)

The plaintiff, with other servants, was employed to assist in handling and removing cars in the yard of the defendant, including, also, as a part of his duty, the removal of damaged or broken cars to the proper place for repairs, under the direction of a foreman, who was subject to the orders of a yard-master and division superintendent; *held* that, as respects risks arising from the acts and omissions of such foreman in the course of such employment, he was to be deemed the fellow-servant of plaintiff.

Where a master has exercised due diligence in the selection of employees,

and in providing safe machinery and in establishing suitable regulations for the safe and proper conduct of his business, the risks incident to the use and handling of such machinery, and the management of the details of the business, must be taken to be assumed by the employees to whom such duties are committed.

The removal of damaged cars to a shop or repair track is necessarily incident to the business of a railway company, and it is not inconsistent with the proper discharge of its duty as master, in providing suitable regulations and arrangements for the transfer of such cars, that an employee assisting in such service should, through accident or the error or omission of a fellow-servant, be misled so as to mistake a damaged for a sound car.

The burden rests upon the servant claiming to be injured in such case to show that the injury is the result of the master's default or negligence in respect to some duty belonging to him as master.

APPEAL from order of District Court, Hennepin County.

Benton & Roberts for appellant, St. Paul, M. & M. Ry. Co.

Arthur M. Keith for respondent, Charles A. Fraker.

VANDERBURGH, J.—For the purposes of this appeal it must be taken as admitted that the plaintiff, at the time of the injury complained of, had been for several months in the employ of the defendant as a brakeman in the yard of the company at Minneapolis. It was his duty, in connection with an engineer, foreman, and other employees, to assist in handling and moving freight cars for different purposes, including damaged or broken cars which were required to be transferred to repair tracks in the same yard. While thus engaged with them in the course of his employment, on the day in question, in removing a damaged car, and while in the act of uncoupling it from an engine, and without fault on his part, his hand was severely injured, in consequence of the coupling attachment being out of repair, of which fact he was not at the time aware.

It was a matter of daily occurrence for these men to be so engaged in removing cars. As to the particular car in question, it appears that it was promptly inspected by a car inspector after it was broken, and set out upon a side track to be transferred to the repair track, and the inspector at the same time caused "bad order" cards to be fastened on each side of it, in the customary way, which indicated that it was to be so removed for repairs, and the signification of which was well known and understood by the employees in the yard, including the plaintiff. It thereupon became their duty, under the direction of their foreman, to remove this car to the proper place for repairs. The plaintiff had on a previous day observed this car, and that it was so marked; but under the circumstances in which he was ordered to uncouple it, he did not recognize or identify it. The engine had been coupled to it, and the foreman, as we must assume from the verdict, gave plaintiff the wrong signal, indicating that it was to be sent to a track which was not in the direct line or route to the repair track,

and ordered the plaintiff to uncouple the car from the engine at the proper time to carry into effect such order, and the latter not understanding that the car was on the way to the repair track, mistook its character, and failed to exercise the proper caution in the process of uncoupling it. The plaintiff's evidence warrants the inference that if he had observed the marks upon the car, which he did not do, being called to act quickly, he would have proceeded more cautiously; and so, also, if the foreman under whom he acted had given the proper signal to indicate that the car was on the way to the repair track, he would in like manner have protected himself. This foreman was acting under a yard-master who was his superior, and the latter in turn was subject to the orders of the division superintendent of the company.

It does not appear that the foreman had any other responsibility than as above indicated. The plaintiff was employed to assist him in the matter of handling cars in the yard, as well damaged or broken cars as those for ordinary service and use.

1. As respects the discharge of such duties by the parties so employed, and any risks incident thereto, including the acts and omissions of the foreman, the latter must be regarded as the co-servant of plaintiff. Brown *v.* Railroad Co., 27 Minn. 162; McCosker *v.* Railroad Co., 84 N. Y. 82; s. c., 5 Am. & Eng. R. R. Cas. 564; Lawler *v.* Railroad Co., 62 Me. 466; Weger *v.* Railroad Co., 55 Pa. St. 460. The foreman was not deputed to act as the authoritative representative of the master, as superintendent or middle-man, vested with a discretion to control and manage a division or department of the business. Whart. Neg. (2d ed.) § 235. And therefore, as to fellow-servants, his negligence in the discharge of such duties is not attributable to the master. We think, therefore, the court erred in refusing defendant's ninth request to instruct the jury "that the defendant was not liable for any negligence of its servants in the manner of removing the car, nor for any directions given by any one of them as to the manner of removal." So, also, we think the court erred in assuming, in the second and third instructions, given at plaintiff's request, that the foreman, in the course of his employment in the matter of removing and handling damaged cars, was representing the master, and engaged in the performance of duties pertaining to the master, and not to a servant. The duty of handling such cars, after inspection, belonged to these men as the servants of the company in their particular department of duty, irrespective of the particular grade of employment of each in the division of labor necessarily incident to the service. And it was not a duty or service which was being performed by the foreman as master as repects the question of liability to other employees. In other words, it was a servant's and not a master's duty he was discharging.

It is the duty of the master to use reasonable diligence in the employment of servants to secure such as are competent and reliable, and to provide them safe and suitable machinery, appliances, and equipment, and also to establish and promulgate suitable and needful regulations for the safe and proper conduct of its business, having reference to its risks and exigencies; and these are duties which belong to the master as such, and in the performance of which he is bound to exercise such diligence for the protection of his employees; and if they are performed through an agent, of whatever grade, he must be deemed to represent the master, and the latter is accordingly responsible for their negligent performance. Slater *v.* Jewett, 85 N. Y. 73, 74; s. c., 5 Am. & Eng. R. R. Cas. 515; Fuller *v.* Jewett, 80 N. Y. 52; s. c., 1 Am. & Eng. R. R. Cas. 109. But where there has been no lack of diligence on the part of the master in the performance of these duties, it is manifest that the use and operation of machinery, and the execution and management of the details of the business, must necessarily be committed to those who, from the nature of their employment for a common master and a common purpose, are co-servants, who must each, among the hazards of the employment, be deemed to assume the risk of the negligent acts, omissions, or mistakes of fellow-servants, just as he takes the risk of imperfections in machinery which may prove unsafe in fact, though selected and inspected with due care. Rose *v.* Railroad Co., 58 N. Y. 217; Besel *v.* Railroad Co., 70 N. Y. 171; Wright *v.* Railroad Co., 25 N. Y. 566; De Graff *v.* Railroad Co., 76 N. Y. 125; Ladd *v.* Railroad Co., 119 Mass. 412; Holden *v.* Railroad Co., 129 Mass. 276; s. c., 2 Am. & Eng. R. R. Cas. 94. In this case the car had been withdrawn from actual service in the business of the company, and duly inspected, and marked for repairs. That it was a damaged car in process of removal implied no negligence on the part of the company, and there is no contention that the defendant did not exercise due diligence in the matter of the employment and retention of its servants, or that the appliances and arrangements for the transfer of such cars, apart from the question of notice to plaintiff, were not adequate and suitable. Flannagan *v.* Railroad Co., 45 Wis. 104; s. c., 2 Am. & Eng. R. R. Cas. 150; Watson *v.* Railroad Co., 58 Tex. 438; s. c., 11 Am. & Eng. R. R. Cas. 213.

The court modified the defendant's sixth request by inserting the words we have italicized, so that as given it would read as follows: "*Sixth.* The peril incident to the coupling of damaged cars is one to which every railroad brakeman may be exposed by the very nature of his employment, and one which at times must necessarily be incurred. The existence of such peril while such car is being taken to the place of repair implies no negligence whatever upon the part of the railway company, and is no ground

reach the same result that would follow from the same care on the part of the deceased; that if his care and diligence could not learn that the platform was dangerous, it was unreasonable to impute notice, or negligence in not knowing, to the defendant.

WALKER, J.—Appellee brought this action in the circuit court of Peoria county, against appellant, to recover for the death of her husband, J. H. Clark, averred to have been caused by negligence of the railroad company. It appears that deceased was a brakeman in the employment of appellant. That at Davidson's quarry, near the city of Joilet, he was injured in attempting to couple cars at a side track and platform for loading cars with stone. That in coupling them he got between the platform and cars, and his lantern, from some cause, got between him and the cars, and it was so pressed against him that he received internal injuries from which he died.

The negligence averred is, that the track was constructed too near, or close to the platform. That the distance between the cars when on the track and the platform, did not exceed ten inches. That on the second day of July, 1879, in the night, Clark, in the line of his duty, exercising due care, was engaged in coupling a car loaded with stone, and the defendant's servants in charge of the train handled it so negligently, together with the improper location and construction of the platform, that the train struck Clark with great force, and he was thereby killed. It is averred that deceased did not know of the dangerous character of the place, and was ignorant of the distance or space between the platform and cars, but defendant knew it was dangerous but failed to notify deceased of the fact.

On a trial in the circuit court, plaintiff recovered a judgment. Defendant appealed to the appellate court for the second district, where judgment was affirmed and defendant appeals to this court.

It is first insisted that the circuit court erred in admitting evidence of the habits of deceased as to care, prudence and sobriety. Appellee in her declaration averred, as she was required to do, that deceased was in the exercise of due care at the time he sustained the injury of which he died. And as no person was present or knew how the accident occurred, we think this evidence tended to prove that averment. If he was habitually prudent, cautious and temperate, it tended to prove he was so at the time of the injury, which with the instinct of self preservation, would be evidence for the consideration of the jury in determining whether he was in the exercise of care. Had there been witnesses who saw the infliction of the injury, the jury could then have determined from such evidence whether he was careful or negligent, and in such a case this evidence would not be admissible. Where there are no witnesses to describe such an occurrence, the defendant would surely have the right to prove the person was habitually

rash, imprudent, and intemperate, to repel the presumption that he was in the exercise of proper care at the time he received the injury. If evidence is admissible for any purpose, it must be received, and the party against whom it is admitted, if it tends to mislead on some other question, is entitled to have it limited by instruction, to the purpose for which it is admissible.

It is next urged that the trial court erred in admitting evidence as to the usual mode of coupling and uncoupling cars at that switch. One of the issues being tried was whether deceased performed his duty with such negligence as to preclude a recovery. He was bound to use care or no recovery can be had. And what others did, or were in the habit of doing, did not tend to prove that issue. Such a course may have been careless and even reckless, and if so, it did not justify him in omitting the observance of care. We therefore think that such evidence did not tend to prove care on the part of deceased, and the court erred in its admission.

It is claimed the first instruction is erroneous. It, among other things, informs the jury that it is the duty of the master to inform his servants of all danger in and about the premises where they are required by his authority to perform labor. This was manifestly wrong. Railroad employees, as all the books lay down the doctrine, assume the ordinary risks and hazards of the employment. The presumption is that the employee understands the nature and dangers of the employment when he engages in the service, and if not, that he will inform himself. It would be wholly impracticable for railroads and manufacturers to employ men of experience to inform each of the hands that any particular act they are required to perform is dangerous. It would be ruinous to such bodies to hire a person to accompany every brakeman and other employee, to inform them of danger in the performance of any act of duty, or of the danger in the manner of its performance. It is impossible that the law can ever impose such requirement and that is what this instruction, in substance, asserts as a legal requirement.

The instructions further inform the jury that if the employer knows of such danger, and the employees do not, and are unable to learn that the danger by reasonable care and diligence, and the employer fails to advise the employees of the danger, he is, in such case, liable for any injury they sustain. And if the jury believe in this case, that the stone platform was dangerous, and defendant failed to advise deceased thereof, and the deceased did not know of such danger, and could not have learned it by the use of reasonable care, and he was thereby injured, from which he died, then the jury should find the defendant guilty. This branch of the instruction is erroneous, and misstates the law. Moreover there is no evidence tending to prove the company had any notice that the

platform was dangerous, on the contrary it had been used for fourteen years in the same condition it was then in, and many thousand cars had been coupled and uncoupled at that place, and on the same side of the track where deceased was injured and this was the first accident of the kind that had ever occurred on that switch.

But the instruction announces that appellant was liable whether the company knew or not that it was dangerous. It informed the jury that if it was dangerous, they would find the appellant guilty. This instruction was highly calculated to mislead the jury, and should not have been given.

The fourth of appellee's instructions is flatly contradictory, and calculated to confuse and mislead. It asserts that if the track and platform were dangerous, and the company by reasonable care could have learned the fact, and deceased was without knowledge, and could not by reasonable care have learned it was dangerous, and deceased received his injuries thereby, they should find the defendant guilty. If deceased could not learn that the place was dangerous by reasonable care, how can appellant be held liable because it did not learn the fact. Reasonable care only could, when exercised by the company, reach the same results that would be obtained by the use of the same care used by deceased. If his care and diligence could not learn that it was dangerous, it is unreasonable to hold appellant liable, when by the same care appellant could not learn that there was danger.

The seventh of appellee's instructions is loosely drawn, and is not accurate in its statement of the law. It first asserts that if appellant was guilty of negligence, as averred in the declaration, and if deceased was guilty of negligence, if they found from the evidence that appellant was guilty of gross negligence, then it cannot relieve itself from liability, by showing that deceased was also guilty of negligence, if his negligence was slight as compared with appellant's. The instruction speaks of negligence and also of gross negligence of appellant, and then refers to slight negligence of deceased as compared with appellant's negligence. Which degree of negligence of appellant are the jury to compare with negligence of deceased. But above and beyond this, there was no evidence tending to show gross negligence of appellant. There was therefore no evidence upon which to base the instruction. It was therefore error to give it.

For the errors indicated, the judgment of the appellate court is reversed, and the cause remanded. Judgment reversed.

Risks Assumed by Servants in Coupling Cars.—Our readers are referred to the following authorities for a full discussion of the question as to what risks are assumed by a servant employed in coupling cars: Critchfield *v.* Richmond & Danville R. Co., 78 N. C. 300; Le Clair *v.* St. Paul & Pac. R. R. Co., 20 Minn. 9; Chicago & N. W. R. Co. *v.* Ward, 61 Ill. 130; Chicago, etc.,

R. R. Co. *v.* Munroe, 85 Ill. 25; Toledo, etc., R. Co. *v.* Black, 88 Ill. 112; Watson *v.* Houston & T. C. R. Co., 11 Am. & Eng. R. R. Cas. 213; Day *v.* Toledo, etc., R. Co., 2 Am. & Eng. R. R. Cas. 126; Clark *v.* St. Paul & S. C. R. Co., 2 Am. & Eng. R. R. Cas. 240; Nashville C. & St. L. R. R. Co. *v.* Wheeler, 4 Am. & Eng. R. R. Cas. 633; Naylor *v.* Chicago, etc., R. Co., 5 Am. & Eng. R. R. Cas., 460; Pittsburg, etc., R. Co. *v.* Sentmeyer, 5 Am. & Eng. R. R. Cas. 508; Houston & T. C. R. Co. *v.* Fowler, 8 Am. & Eng. R. R. Cas. 504; Northern Central R. R. Co. *v.* Husson, 12 Am. & Eng. R. R. Cas. 241; Burlington, etc., R. R. Co. *v.* Coates, supra; see also cases infra.

Burlington, Cedar Rapids and Northern R. R. Co.

v.

Coates, Administratrix.

(*Advance Case, Iowa. December* 13, 1883.)

A brakeman of some experience in the employ of a railroad company stepped between two box cars which were in motion in order to couple them. While so doing his foot slipped into a certain unblocked frog. He fell, was run over and was killed. In an action to recover damages for his death his administrator called brakemen to the stand and asked them what the danger was, in running along the track coupling and uncoupling cars, from frogs. He also asked whether a person walking between two slowly moving box cars to couple them could see a frog on the track. *Held,* that the answers to these questions were mere matters of opinion and were not admissible in evidence.

It was competent for the plaintiff to prove in the above case a general order of the company defendant to block all frogs and a neglect of such order in the case of the frog in question, although such facts were not specially averred in his complaint.

In an action to recover damages for causing the death of a brakeman on a railroad, standard life tables are admissible to show the probable duration of the life of a person of decedent's age and thus aid in estimating the damages, and this notwithstanding the hazardous nature of the employment of deceased.

Any instruction which assumes a fact to be conceded by a party when it is not in point of fact so conceded, is erroneous.

When in the above case the railroad company had showed that deceased had actual knowledge of the alleged danger to which he was exposed, the burden of proof was upon the representatives of the deceased to show some excuse for his conduct in exposing himself to danger. In the absence of such excuse, there could be no recovery as the deceased had clearly been guilty of contributory negligence.

In the above case the court instructed the jury that the measure of damages was such a sum, not exceeding the amount claimed, as they should find from the testimony would compensate for the loss sustained. *Held,* that the instruction should have been more explicit in defining the measure of damages.

Appeal from Linn Circuit Court.

The plaintiff is the widow and administratrix of the estate of J. Q. Coates, deceased, and she seeks to recover damages for injuries

resulting in the death of the deceased, from being caught in a frog and run over by one of defendant's trains, while engaged in coupling cars at Vinton, in this State.

There was a trial by jury which resulted in a verdict and judgment for plaintiff for $5000. Defendant appeals.

J. & S. K. Tracy for appellant.

Mills & Keeler for appellee.

ROTHROCK, J.—The deceased was about twenty-five years of age, and had three or four years' experience on railroads as a brakeman and switchman. He had been in the employment of defendant as a brakeman on freight trains for about two months previous to his death. At the time of the accident he was assisting in making up a freight train at Vinton. In performing this service he was on top of the cars, and was directed to cut off two cars from the train. He descended from the cars and signaled the engineer to back up. The signal was obeyed and the train was backed very slowly. Immediately upon giving the signal Coates stepped between the cars to pull the pin. He made one or two steps along with the moving train, when his foot was caught and fastened in the angle of a frog in the track and he was run over, receiving injuries from which he died in a few hours.

It is not, and cannot be claimed that any employee of the defendant was negligent in directing deceased to uncouple the cars as to the time and manner of directions given to him, nor that there was any negligence upon the part of the engineer. The evidence is undisputed that the train was backed very slowly, and that deceased took but a step or two after he went between the cars when he was caught in the angle of the frog. The train was stopped so suddenly that only one pair of trucks passed over him.

About fifteen days before the injury the defendant had put in a temporary spur track east of the switching yard at Vinton, for the purpose of moving earth to fill in a short piece of track. This spur track was not used for regular trains or cars, but simply for short dump cars hauled by horses. It was connected with the main track by the frog in which deceased caught his foot and was injured.

It is averred in the petition that the "defendant negligently constructed the same (the spur track), and negligently omitted to put blocks in the frogs at the intersection of the rails of said main and side track, or provide other safeguards between said rails, in the frog, or crotch, or intersection, at or near said switch, and whereby the employees of defendant using said track were wrongfully exposed to great danger and hazard."

The defendant in its answer denied the averment of negligence, and averred that "decedent was guilty of contributory negligence and want of proper care and caution at the time, in so carelessly

walking upon said track as to get his foot fastened in the frog therein; that deceased knew of the existence of said frog, its location and manner of construction, and made no objection thereto, and was promised no change therein; that he was an experienced brakeman, and had often worked about this frog and track, and by the exercise of reasonable care and caution could well have known of its location and construction, and the dangers thereto, if any such dangers existed in fact, and yet made no complaint, and no promise of change was made therein, and wherefore defendant asked judgment for costs."

The plaintiff introduced a witness who was a brakeman, and he was examined as follows:

Q. "Now in the practice of uncoupling cars, what danger is there, if any, from frogs? What danger is there to brakemen in moving along the track? What danger is there from frogs in moving along the track uncoupling? (Objected to as incompetent.)

A. "They are very dangerous if you get your foot into them."

Another witness was asked this question:

Q. "Provided two cars were together and a person between the cars in motion, uncoupling, could he uncouple the cars and at the same time see whether or not there was a frog upon the track at that place?"

A. "He could not when the train was in motion."

Q. "If a person were between two box freight cars moving while he was uncoupling the cars could he tell whether a particular frog along the track was blocked or not blocked?"

A. "Well, that would depend upon circumstances altogether; the speed the train was going, and how much time he had to look around."

Q. "Well, in the act of uncoupling cars?"

A. "Well, no sir; if a train was in motion and a man was not looking for that frog he couldn't see if he went in to uncouple cars."

The questions above set out were objected to as incompetent, and in those asked of the last witness the ground of incompetency was that they called for an opinion of the witness. The objections were overruled, and the defendants excepted, and assigned the rulings as error.

There is some doubt in our minds as to whether the objection to the first above question was sufficient in that it did not state that the question called for an opinion. The objections to the questions propounded to the other witness were sufficiently explicit, and in our opinion they should have been sustained. They call for an opinion of the witness as to whether or not when the train was in motion a person could go between the cars and uncouple them, and at the same time see whether a frog in the track was blocked. This is not a fact. It is an opinion of the witness based upon a complication of circumstances. It involves the questions as to the

distance between the cars, the movement of the train, and the attention of the party making the coupling to the act in which he was engaged. It will be observed that it is not a mere inquiry whether a particular object can be seen from a given position. The answers to the question impliedly concede that is is not physically impossible to stand or walk between two box cars coupled together, and at the same time see a frog in the track; but whether seen or not would depend on circumstances altogether; "the speed the train was going, and how much time he had to look around." These circumstances were proper facts to present to the jury, but to group them together and allow a witness to give his opinion as conclusion upon them was, in our opinion, clearly erroneous. It was a question for the jury to determine from all the facts whether the deceased in the exercise of proper diligence could or should have seen the frog and avoided the injury. Hamilton *v.* Railroad Co., 36 Iowa, 31; Belair *v.* Railroad Co., 43 id. 652; McKean *v.* Railroad Co., 55 id. 192; Allen *v.* Railroad Co., 57 id. 624.

The plaintiff among other things proved an order and custom of the defendant to block all frogs along the line of its road. This evidence was objected to and it was urged that the same was incompetent because no such custom or order was pleaded, and that the omission or observance of the order was not in issue. We think the evidence was not incompetent. There was an issue to which it was applicable. The negligence complained of was the failure to block the frog or provide other safeguards at the angle in the frog. To aver that the defendant by an order had required all frogs to be blocked, and that the order was not observed as to this particular frog, would have been merely pleading evidence tending to show negligence. The existence of a general order of this character was important only as a circumstance in the nature of an admission that without some protection frogs are dangerous to employees whose duty requires them to go upon the track in close contact with moving trains. It will be understood that while we hold this evidence as competent, we do not determine that the failure to block this particular frog was negligence. It was a proper fact to be taken into consideration by the jury in connection with the other facts in the case, such as that the frog was placed there for a temporary purpose, its location with reference to the switching yard, and other facts disclosed in evidence.

The plaintiff introduced certain life tables showing the probable duration of the life of a person of decedent's age. The evidence was objected to by the defendant. It is conceded that the tables introduced in evidence are the standard in common use in this country, but it is objected that they are not competent evidence as to the probable duration of the life of a person engaged in extra hazardous and dangerous avocations. We think this evidence in cases of permanent personal injuries to railway operatives has been

too long conceded to be competent and proper to be now questioned.

The court gave to the jury the following instruction at plaintiff's request:

"2. Defendant claims that said Coates was an experienced brakeman, and actually knew, or by the exercise of ordinary care could have known, that the frog where he received his injury was not blocked, and was in a dangerous condition, and that by remaining in defendant's employment thereafter, without protest or promise of amendment of the defect, he assumed such risk, and waived any right to recover for injuries caused thereby. Upon this question the jury are instructed that said Coates, by entering into and remaining in defendant's service, assumed only the ordinary risks directly connected with his immediate employment as a brakeman, and did not assume any risk or dangers resulting from a defective and dangerous track or frog, unless prior to the time of his injury, he actually knew, or by the use of reasonable and ordinary care, under all the circumstances, should have known that the particular frog where he was injured was in a defective and dangerous condition, and thereafter remained in defendant's employment, using such track and frog without objection or promise of amendment of such defect."

This instruction is complained of because it assumes that the defendant conceded that the frog was in a dangerous condition. We think the objection is well taken. Appellee claims that the defendant pleaded a confession and avoidance by averring that the deceased knew or by the exercise of ordinary care might have known of the condition of the frog, and that he made no objection thereto and was promised no change therein whereby he assumed the risk. By an examination of the averments of the answer it will be seen that the defendant does not admit that the frog was in a dangerous condition. It is therein stated that the deceased "could well have known of its location and construction, and the dangers thereto, if any such dangers existed in fact." We know of no rule of pleading which would have required the defendant to admit that the frog was in a dangerous condition in order to avail itself of the defence that deceased knew of its actual condition and made no complaint thereof.

The court further instructed the jury to the effect that if deceased had knowledge of the condition of the frog, and continued in the employment of the defendant, and made no complaint thereof, and was not promised a change, there could be no recovery, and that the burden of proving the same is on the defendant. It is urged that this instruction was erroneous because it not only required the defendant to prove that the deceased had knowledge of the defect, but also to prove that he did not make complaint thereof, and was not promised a change therein. In Wells *v.*

Railroad Co., 56 Iowa, 520, it was held that the burden rested upon the defendant to prove the affirmative allegation of the defence to the effect that the plaintiff had knowledge of the alleged danger to which he was exposed.

We think that when the defendant has shown that fact, it may well rest upon it as a defence and that in the absence of some excuse from the plaintiff for exposing himself to dangers known to him, there can be no recovery. It is a general rule (subject of course to some exceptions) that a party to an action is not required to establish the negative of a proposition. When the defendant shows that the plaintiff knew of the dangerous condition of the road or machinery which he aided to operate, it is then incumbent on the plaintiff to show that he was in some manner justifiable in exposing himself to the danger. The fact that such proof cannot be made in some cases where the injury results in death is no reason why the rule that the party who holds the affirmative of an issue is required to assume the burden of proof should not be enforced. If the burden should have been held to rest on the defendant to prove the negative, it would be required to introduce as witnesses all of its officers and employees to whom such notice might properly be given, and prove by them that no complaint was made.

The court further instructed the jury as follows:

"9. If you find for the plaintiff, the measure of damages will be such a sum, not to exceed the amount claimed, as you find from the testimony in the case will compensate for the loss sustained by the injuries, taking into consideration all the testimony before you having a bearing therein."

This instruction should have been more explicit in defining the measure of damages to which the plaintiff was entitled, if any. For the elements of damages properly entering into cases of this character, see Donaldson v. Railroad Co., 18 Iowa, 280.

For the errors above pointed out the judgment will be reversed, and the cause remanded for a new trial.

Reversed.

Similar Cases.—See for instances of injuries occurring in the same manner as that occurring in the principal case, Williams v. Iowa Central R. R. Co., 43 Iowa, 396; Lake Shore, etc., R. R. Co. v. McCormick, 5 Am. & Eng. R. R. Cas. 474; Phila. & Reading R. R. Co. v. Schortle, 2 Am. & Eng. R. R. Cas. 158, Batterson v. Chicago & Grand Trunk Ry. Co., 8 Am. & Eng. R. R. Cas. 123. See cases, infra.

BROWN, Administrator,

v.

ATCHISON, TOPEKA AND SANTE FÉ R. R. CO.

(*Advance Case, Kansas.* 1883.)

A portion of the evidence introduced on the trial tended to show that the plaintiff's intestate, who was a yard switchman in the employ of the defendant railroad company, and whose duty it was to couple cars, and who was a new man in the yard, and had but little knowledge of the same, while attempting to couple a flat car, loaded with projecting bridge timbers, and a box car, properly went in between them to couple them, and stepped into a ditch, made by the railroad company, of which ditch he did not have previous knowledge, and slipped, and, in recovering himself, so raised his head that it came between the projecting timbers and the box car and was so crushed that he immediately died: *held*, that such evidence tended to show negligence on the part of the railroad company, and did not necessarily show negligence on the part of the plaintiff's intestate.

Where the defendant in a case which is being tried by a jury, files a demurrer to the plaintiff's evidence, on the ground that the evidence does not prove any cause of action: *held*, that unless the plaintiff has utterly failed by all his evidence to prove his case or some material fact in issue in the case, the demurrer should be overruled.

The decision of a case by the court upon a demurrer to the evidence is entirely unlike either the decision of the case by a jury upon the evidence, or the decision of the case by the court upon a motion for a new trial; for where the court sustains a demurrer to the evidence the court must be able to say that, admitting every fact that is proved which is favorable to the plaintiff, and admitting every fact that the jury might fairly and legally infer from the evidence favorable to the plaintiff; still, the plaintiff has utterly failed to make out some one or more of the material facts of his case; while all that is necessary for a jury to say, in order to find a verdict against a plaintiff, is that, although the plaintiff may have introduced an abundance of evidence to prove every material fact of his case, yet that it does not outweigh or does not preponderate over that which tends to prove the defendant's side of the case; and all that is necessary for the court to say, in order to sustain a motion for a new trial upon the ground that the verdict is against the evidence, is that, although there is plenty of evidence to sustain the verdict, yet that the evidence is conflicting, and the weight or preponderance of the evidence is clearly against the verdict.

Scott & Lynn and W. N. Lowe for the plaintiff in error.
George R. Peck and C. N. Sterry for the defendant in error.

VALENTINE, J.—This was an action brought by Joseph Brown, as administrator of the estate of William Haas, deceased, against the Atchison, Topeka & Santa Fé R. R. Co. to recover damages alleged to have resulted from the negligence of the defendant in wrongfully causing the death of the deceased. The action was brought under section 422 of the Civil Code, to recover damages for the benefit of the next of kin to the deceased.

timbers on the flat car and the box car and was so crushed that he immediately died. The plaintiff claims that except for the ditch Haas would not have been injured. The plaintiff also claims that except for the projecting timbers, Haas would not have been injured. The box car, after it was set in motion by the switch-engine moved at the rare of six or seven miles per hour. At the time of the accident, the railroad company was so crowded with business that the yard-men in that yard had to perform their labors in making up trains and attending to their other duties in a great hurry.

The defendant claims that besides the admitted facts, the following facts were proved: Although Haas had been in the employ of the railroad company at the old yard for some time previous to his employment at the new yard, yet he had been in the company's employment at the new yard for about seventeen days prior to the accident which caused his death; and he accepted the employment at the new yard because of an increase in his wages well knowing the situation and condition of the new yard. He had on other days, and indeed every day for seventeen days immediately prior to the said accident, coupled other cars on said south track, and must have known the exact situation and condition of the ditch and all its surroundings. The ditch was at all times in plain sight, and no one could have gone near it without seeing it. Besides, it was not so deep as claimed by the plaintiff, and was not situated immediately under the east ends of the projecting timbers, as the plaintiff claims; nor was it situated where the accident occurred; nor did the deceased step into it; and it had nothing to do with the accident or with causing the death of the deceased. The flat car and the projecting timbers were also in plain view, so that if any one had even glanced toward them he must have seen them and known their condition. The deceased was expert in his business, capable of taking care of himself; and no person was in charge of the coupling of the cars except himself. The difference between the height of the drawheads on the two cars was scarcely appreciable; and Haas could have gone in between the cars and coupled the same without any danger to himself if he had merely squatted down, with one foot inside of the rails and the other extending backward outside of the rails, instead of stooping over, as he did. He could also have coupled the cars with perfect safety to himself by remaining outside of the track and using the coupling-stick which he at the time held in his hand. The box car did not move faster than a man could walk. Cars with projecting timbers, like the said flat car, were frequently received in that yard about that time and were coupled and uncoupled with safety; and Haas had full knowledge of these facts. The defendant also claims that the reason why it commenced operations in the new yard before it was finished and because the old yard was over-crowded with business.

We think the preponderance of the evidence as introduced on the trial comes nearer proving the facts as claimed by the defendant than as claimed by the plaintiff; and if the court below had been trying the case upon the evidence, without the jury, its decision upon the evidence would have been correct. Upon a preponderance of the evidence, we think the findings and judgment in the present case should be in favor of the defendant and against the plaintiff. But the case was not submitted to the court below upon a preponderance of the evidence. The question as presented to that court was simply whether the plaintiff had introduced some evidence to prove every material fact of his case or had utterly failed to prove his case. Now, while we think the preponderance of the evidence was in favor of the defendant and against the plaintiff, yet we cannot say that the defendant did not introduce sufficient evidence to prove his case, provided no conflicting or countervailing evidence had been introduced, tending to prove the other side of the case. We think there was some evidence introduced tending to prove all the material facts of the plaintiff's case, and some evidence to prove all of the facts as they are claimed to have been proved by the plaintiff; and when we say some evidence, we do not mean that there was merely a bare scintilla of evidence, but we mean that there was an amount of evidence worthy of consideration, and an amount of evidence that would have entitled the plaintiff to a verdict in his favor if all the contradictory and conflicting evidence should not be considered or should not be believed by the jury. Ordinarily a railroad company is bound to exercise reasonable care and diligence in furnishing its employees with a reasonably safe place at which to perform their labors, and with reasonably safe implements, tools or machinery, with which to work; and if the railroad company fails in this, it is negligent, and for any injuries resulting from such negligence it is liable. It is probable in the present case, that with the amount of business which the railroad company had on hands, it was necessary to commence using the new yard before it was entirely completed or finished; and therefore that it would be excusable for any defects in the new yard, provided its employees had full knowledge of such defects and were warned against them. And under such circumstances the railroad company would not be negligent, and the employees continuing in the service of the company, would, as in other cases, take all the risks and hazards connected with their employment; and then if they should go into danger with their eyes open knowing the risks, it would be their own fault and not that of the railroad company, if they received injuries. Under such circumstances they would themselves be guilty of negligence, and could not recover from the railroad company. But in the present case, we cannot say as a matter of law that Haas, the deceased, had any previous knowledge of the existence of this ditch.

There is no evidence that clearly and conclusively shows that he had. Under the evidence, he may not have had any such knowledge. It does not appear that he was ever near the ditch or that he even looked toward the same prior to the accident. It would seem from the evidence, or at least a part of it, that he had his eyes turned toward the moving car, and not toward the ditch during the whole of the time while he was intending, expecting, and preparing to couple the cars. Of course, if he had known of the existence of the ditch and of its condition, previous to the accident, and had then walked into it, as some of the evidence seems to show, he would have been guilty of such culpable negligence that his administrator, the present plaintiff, could not recover in this action. But, as we have before stated, the evidence does not show that he had any previous knowledge of the existence of the ditch; and without knowledge he would have had the right to assume that no such dangerous place existed in the yard. As before intimated, all employees have a right to assume that their employers will furnish them with a reasonably safe place at which to exercise their employment.

With these views, it follows that the court below erred in sustaining the demurrer to the evidence. If the evidence had been submitted to the jury, the jury should have found just as the court did; but the jury would have made their finding upon the preponderance of the evidence. But the court upon a demurrer to the evidence does not decide the case upon a bare preponderance of the evidence. It must be able to say before it sustains the demurrer that, admitting all the evidence to be true which the plaintiff has introduced and that none of the evidence conflicting therewith is true, the plaintiff has utterly failed to make out his case. If the court below had overruled the demurrer and allowed the jury to decide the case; and if the jury had then decided it in favor of the plaintiff, and against the defendant; and the court had then granted a new trial upon the ground that the verdict was not sustained by sufficient evidence; such a decision would be right, and this court would undoubtedly sustain the decision. Cunningham *v.* Chicago, etc., R. R. Co., 17 Federal Reporter, 882. But the decision of a case by the court upon a demurrer to the evidence is entirely unlike either the decision of the case by a jury upon the evidence, or the decision of the case by the court upon a motion for a new trial; for where the court sustains a demurrer to the evidence the court must be able to say that, admitting every fact that is proved which is favorable to the plaintiff, and admitting every fact that the jury might fairly and legally infer from the evidence favorable to the plaintiff; still, the plaintiff has utterly failed to make out some one or more of the material facts of his case; while all that is necessary for a jury to say, in order to find a verdict against a plaintiff, is that, although the plaintiff

may have introduced an abundance of evidence to prove every material fact of his case, yet that it does not outweigh or does not preponderate over that which tends to prove the defendant's side of the case; and all that is necessary for the court to say, in order to sustain a motion for a new trial upon the ground that the verdict is against the evidence, is that, although there is plenty of evidence to sustain the verdict, yet that the evidence is conflicting and the weight or preponderance of the evidence is clearly against the verdict. A new trial may be granted upon evidence, that would not authorize the sustaining of a demurrer to the evidence. And this is right, for a new trial gives the parties another opportunity to make out a good case; but a decision sustaining a demurrer to the evidence is final. We think the demurrer to the evidence was erroneously sustained in the present case. The present case, however, is a close one, and different minds might fairly come to different conclusions; yet we think there was sufficient evidence introduced on the trial by the plaintiff from which, if it had been wholly uncontradicted, the jury might have inferred negligence on the part of the defendant, and no contributory negligence on the part of the plaintiff, and might, therefore, have inferred that the plaintiff was entitled to recover.

The judgment of the court below will be reversed and cause remanded for a new trial.

The above case is in its facts almost identical with Northern Central Ry. Co. *v.* Husson, et al., 12 Am. & Eng. R. R. Cas. 241. See for the authorities relative to injuries received while coupling cars, in addition to the above case, Hathaway *v.* Michigan Central R. R. Co., 12 Am. & Eng. R. R. Cas. 249, and note; Baird *v.* Chicago R. I. & P. R. Co., 12 Am. & Eng. R. R. Cas. 75; Skillinger *v.* Chicago & N. W. R. Co., 12 Am. & Eng. R. R. Cas. 206; Whitman *v.* Wisconsin & M. R. Co., 12 Am. & Eng. R. R. Cas. 214. See also cases infra.

LOUISVILLE AND NASHVILLE R. R. CO.

v.

MCCOY.

(*Advance Case, Kentucky. Nov.* 6, 1883.)

Under the civil Code of Kentucky, § 340, specifying the grounds upon which a new trial may be granted, some are stated with such particularity that the language may be followed literally in any case, others, if adopted in verbis, would not enable the court to know with any certainty what error was complained of. Of this kind is that embraced in sub-sec. 8, error of law occurring at the trial and excepted to by appellant, hence, when this is the ground the particular error must be pointed out with such certainty that a person of good understanding may know what is meant. It is proper to designate each question not allowed to be answered upon the exami-

nation, and each instruction refused, especially if there are several issues involving different matters, but where all the questions and instructions related to the one subject of negligence, its degrees and by whom committed, it is sufficient to set out that "the court erred in law in refusing to submit to the jury the questions propounded," and that "the court erred in its instructions to the jury."

Appellee brought this action against appellant to recover damages for injuries inflicted upon him by the gross and wilful negligence of appellant's agents, while he, as brakesman, was engaged in coupling cars under their orders. In considering the question of care and negligence the court holds that ordinary care is such as is commonly exercised by persons of ordinarily prudent habits when placed under like circumstances. But this is only a general definition as the extent to which one is under another's control, and the danger to which he is exposed must effect the degree of care in each case, and this definition therefore does not exhibit the ordinary care which is required of a railroad in the treatment of its brakesmen. Ordinary care by them is that which a majority of men of prudent and careful habits would exercise to avoid injury to their own persons were they exposed to the same risks which brakesmen undergo. But a railroad is not bound to take that higher degree of care which a prudent and careful man would take of his family if placed in like situation to the brakesman, and an instruction to that effect is here erroneous.

In the management of a railroad, gross neglect is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits would observe in avoiding injury to his own person or life under like circumstances. But to make out gross negligence it is not necessary to show such a degree as indicates intentional wrong to others or such a reckless disregard of their security as implies bad faith.

Where one is guilty of wilful negligence, he is not in general excused from liability by the contributory negligence of the injured party.

The injured party is entitled to exemplary, punitive or vindictive damages only where the defendant has been guilty of gross negligence.

APPEAL from Jefferson Court of Common Pleas.

Cooke, Lindsay & Caldwell for appellant.

Kinney, O'Niell, Harlan & Wilson for appellee.

HARGIS, J.—In the beginning collision of counsel renders it necessary to determine what questions are, by the grounds for new trial and assignment of errors, presented to the court for its decision.

According to § 340, Civ. Code, there are eight general causes for granting a new trial, some of these causes are stated in that section with sufficient particularity to be followed specifically in the written grounds which may be filed by a party, but others are so generic that the language of the Code, if literally pursued, would not enable the court to know with reasonable certainty what particular error was complained of. This is especially the case with the eighth sub-section, which was intended "to cover all errors to which exceptions might be taken, not embraced by some one of the preceding seven sub-sections." McLain v. Dibble & Co., 13 Bush, 297.

That case holds correctly that the language of the eighth sub-section, which authorizes a new trial for "error of law occurring at the trial and excepted to by the party making the application," was the generalization of the law-makers and not sufficiently specific to point out the particular error which might be intended by the written grounds. That sub-division makes every error of law, which may be committed and properly excepted to during the trial, a cause for a new trial. Hence when the cause for new trial is embraced by it, the particular ground or cause must be named in the written grounds with such a degree of certainty that a person of good understanding may know what is meant. Among other grounds for a new trial the appellant relied upon the following:

5. The court erred in law in refusing to submit to the jury the questions propounded by defendant's counsel.

7. The court erred in the instructions to the jury.

These grounds are embraced by the eighth sub-division of § 340 of the Code and, as we think, are sufficiently specific to indicate the errors of which the appellant complains. There were only three questions which appellant asked to be propounded, and only two instructions which were given by the court to the jury. The questions and instructions all relate to negligence, its degrees, character, and by whom committed, and it seems should be considered together in order to understand the meaning of the court below. If more particularity were required in stating grounds for new trial than the appellant has used, the courts must finally become entangled in the uncertainty which generally belongs to human expression, and as each case is presented to different judges, whose minds differ in the understanding of the force or meaning of language, the rule regarding the sufficiency of grounds for new trial will be found to vary as much as their mental conceptions. This vague and misleading state of the rule, which should be uniform and certain, as far as the subject will admit, was never contemplated by the lawmakers. The object of the motion and grounds for new trial is to call the attention of the trial court to any error that may have been committed at the trial and to allow an opportunity, without the expense and delay of an appeal, of correcting it. This being so, all that is necessary in any case is to use such plain and intelligible language in the grounds for new trial as indicates, points out, or shows to the court with reasonable and ordinary certainty, the particular errors which are complained of, so as to enable the court, by the exercise of proper attention, to understand what errors are meant and to consider the facts or law out of which they are alleged to have grown. Unreasonable particularity or technical accuracy in the description of the errors is not required or practicable either in the grounds for new trial or the assignment of errors.

To describe each error with every particularity belonging to it would swell the grounds for new trial and the assignment of errors beyond their necessary or proper compass.

The law does not mean that the grounds for new trial shall contain a particular description of the errors relied on, but that the particular errors shall be simply pointed out or indicated in a common sense way.

Often and most generally a few well chosen substantives or strong words referring to the subject and the action of the court thereon, will point out or name the error or errors as well as the most lengthy description. The court could hardly fail to know what errors the appellant relied on by the grounds for new trial above quoted.

There is no objection to pointing out or designating each instruction and each question conceived to be erroneously given or refused and this is certainly a safe course to pursue, but where the questions or instructions relate to the same general question and its various phases, it is nearly always important to take a view of the whole in order to understand the defects or omissions of any one of them, and a ground for new trial referring to them in the plural number is sufficiently specific. Where there are several issues and various questions of a different nature, then it may be a general reference to the instructions or questions would not be specific enough to guide the mind of the court to the supposed error. In such instances sharp practice or an effort to embrace some error by an indefinite or too general ground without descending to particulars could be discovered with but little trouble and cut off by the application of the rule in the sense we have attempted to explain it above.

The assignment of errors, however, comprehends several alleged errors which were not alluded to in the grounds for new trial and they will not, therefore, be considered.

This was an action brought by the appellee to recover damages of the appellant for personal injuries inflicted upon him, by the alleged gross and wilful neglect of its agents while he, as brakeman, was engaged, under their superior orders, in coupling the appellant's cars. The evidence bearing upon negligence and the extent of the injury was conflicting and of such a nature as required the court to instruct the jury upon the degrees of ordinary, gross and wilful neglect and in the law of contributory negligence.

There were but two instructions given to the jury, and they were confined to the definition of ordinary and gross neglect. As to other questions, the jury were directed to answer certain interrogatories, and in response to one of these they fixed the appellee's compensatory damages at $7593.50. The instructions are in this language:

1. The court instructs the jury that ordinary care is that degree

of care which an ordinarily careful and prudent man usually exercises under like or similar circumstances in taking care of himself, his family or his property, or in the transaction of his business when the same may endanger the safety of others.

2. The court instructs the jury that gross negligence is that degree of negligence which indicates intentional wrong to others, or such a reckless disregard of their security or rights, as to imply bad faith.

These instructions are both erroneous. Ordinary care, in its general sense, is such care as is commonly exercised by the majority of the community or by persons of ordinarily prudent habits placed under similar circumstances. But as the nature of the subject of the required care, whether animate or inanimate, capable of a high, low or ordinary degree of self-preservation, or merely under the control of the person charged with the care, and the danger to which it is exposed, are the main considerations in determining ordinary or any other degree of care in a given case, it is clear that what would be ordinary care in one kind of business would be gross negligence in another. The law has a peculiar regard for human life, and as the business of conducting a railroad subjects it to extraordinary hazard, the general definition of ordinary care does not exhibit that care which the duty of those conducting railroads requires them to observe in its ordinary management. Ordinary care by them is that degree of care which a majority of men of prudent and careful habits would exercise under the same or like circumstances to avoid injury to their own persons from the same risks which others undergo in their service or in obedience to their orders, or by reason of the conduct of their hazardous business. But it is going quite too far to require that degree of care which any of such persons would take of "his family," placed in like or similar circumstances.

For it is against the laws of nature to expect a man of the greatest prudence to take the same care of an adult engaged in the dangerous employment of brakesman, which he has voluntarily taken upon himself and agreed to perform with that degree of care upon his own part which ordinarily prudent persons of his class usually take in protecting themselves from danger, as he would of his own family placed in a like predicament. For what would not a husband and father hazard to protect his own family from the ordinary dangers to which a brakesman is exposed. Imagine his horror, himself controlling every movement of the train, were he to see any member of his family engaged in the dangerous and difficult office of coupling the cars. It was not a fair test. It was calculated to transport the jury into sentimental regions in search of the exalted degree of care which ordinary prudence dictates under such circumstances, and opened a wide realm in which the skilful advocate could "fling the reins to fancy." It is well that ordi-

nary care, in such cases, should demand the same care that prudent persons take to avoid injury to themselves. But it ought not to be extended to their families, for no prudent man would place his family in every situation into which it might be his or the duty of others to go, although the duty might be attended with more or less danger, or even performed with safety. If railroad managers or agents take the same care of others that prudent and careful men usually take of their own persons in like peril or under similar circumstances, they should be considered as having taken ordinary care.

Neither intentional wrong nor the implication of bad faith necessarily belongs to the definition of gross neglect. A person may be guilty of gross neglect without intending to do wrong to others or to act in bad faith in the performance of a legal or social duty. Gross negligence is not equivalent to fraud or malice, while it may "furnish evidence of fraud" or tend to show malice. Tudor v. Lewis, etc., 3 Met. 385. And in order to make out gross neglect it is not necessary to show that it is of such a degree as indicates intentional wrong to others or such a reckless disregard of their security or rights as to imply bad faith. The definition given in instruction No. 2 accords with the Roman civil law and with the definition of gross neglect found in Louisville & Nashville R. R. Co. v. Robinson, 4 Bush, 507; but it is not sustained by other cases decided by this court and it is contrary to the common law. Shearman & Redfield on Negligence, §§ 3 and 37; Hansford v. Payne, 11 Bush, 382; 10 Bush, 679. So much of the case of L. & N. R. Co. v. Robinson as holds that "gross neglect is either an intentional wrong or such a reckless disregard of security and right, as to imply bad faith and therefore squints at fraud, and is tantamount to the magna culpa of the civil law which, in some respects, is quasi criminal" is overruled because it confuses elements of wilful neglect and substitutes them for those of gross neglect. There is some difficulty in laying down a definition of gross neglect which will include every state of facts on which the charge may be sustained and exclude every other that cannot authorize the deduction. Shearman & Redfield, § 18, say: "Gross negligence is the want of even slight care and diligence." This court, in Maysville & Lex. R. R. Co. v. Herrick, 13 Bush, 122, said that "punitive damages were recoverable, if the proof showed that the company failed to use such diligence in keeping its railroad bridge in repair as careless and inattentive persons usually exercise in the prosecution of the same or of business of like character;" that "the absence of slight care in the management of a railroad train, or in keeping a railroad track in repair, is gross negligence," and that it was not necessary to show the absence of all care, reckless indifference or intentional misconduct to make out gross neglect. These alleged definitions of gross neglect are rather the statement

of instances showing gross neglect than a definition embracing every state of facts constituting such neglect. It is certainly true in the management of a railroad that the absence either of all care, of the lowest degree of care or of slight care is gross neglect, but it does not follow that the presence or exercise of slight care in the general sense and ordinary application thereof in matters of little or no peril to life negatives the existence of gross neglect charged in the management of a railroad where human life is constantly in more or less danger.

Slight care in cases of this character should be of a higher grade or greater care than is required in an ordinary or less hazardous business. And while we agree with the doctrine in the M. & L. R. R. Co. *v.* Herrick, that if the proof showed the company failed to use such diligence as careless and inattentive persons usually exercise in business of like character puntive damages were recoverable, still we do not think the standard of the test in that case is strict or broad enough for any case possible to arise. We think in view of the nature and hazard of the business of railroad management that slight care in such business is more than careless and inattentive persons usually exercise in like business, whatever may be the scope of those terms they are not explicit in their comprehension and may mislead if adopted as a standard in ascertaining the existence or non-existence of slight care, and consequently the presence or absence of gross neglect for which punitive damages may be given where death does not ensue. In the management of a railroad, or any department thereof, gross neglect is the failure to take such care as a person of common-sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life under circumstances of equal or similar danger to those which may be under investigation.

There is an allegation of wilful as well as gross neglect in appellee's petition, and as the appellant complains that the law of contributory negligence was not correctly expounded to the jury, it becomes necessary to define wilful neglect. According to the cases of City of Lexington *v.* Lewis' adm'x, 10 Bush, 677; Jacobs' adm'r *v.* L. & N. R. R. Co., id. 263; Louisville & Portland Canal Co. *v.* Murphy, adm'r, etc., 9 Bush, 522; Board Int. Imp. Co. *v.* Scearce, 2 Duvall, 576; and Claxton's adm'r *v.* Lex. & B. S. R. R. Co., 13 Bush, 636; wilful neglect in the statutory sense implies actual malice or anti-social recklessness, and may be equivalent to fraud. In general wilful neglect is the intentional failure to perform a known or manifest duty in which the public has an interest, or which is important to the person injured, either in preventing or avoiding the injury to him. Where this high grade of negligence may be proven against a party he must answer in damages, notwithstanding the contributory fault of the person in-

jured by it. This was the rule enunciated in substance in the cases found in Louisville, Cin. & Lex. R. R. Co. v. Mahoney's adm'x, 7 Bush, 235; Digby, etc. v. Kenton Iron Co., 8 Bush, 166. It is the general rule, while there are exceptions to it which may often arise. For instance, where the person injured, knowing of the neglect of the party charged, voluntarily, with the intention of causing his own injury, placed himself where the injury could not be avoided either before or after the discovery of his condition. In such cases no recovery should be had. But where the neglect is wilful, the injury wanton, malicious or immediately intentional, contributory negligence of the person injured should not excuse unless of some such peculiar character as indicated in the exception noted above.

Whether the contributory neglect be active or passive it will not vary the rule if the action of the person injured results from an honest effort on his part to perform some duty connected with his station, or thought to be so by some superior, who directs him to discharge that duty. And in no case will the wilful neglect of a party be excused by the contributory negligence of the person injured unless the contributory fault is more than gross neglect, and amounts to a purposed injury which could not be avoided by the exercise of a proper degree of care before or after its discovery. This rule seems to be absolutely necessary to the protection of human life, and it should be recognized wherever the proof will authorize it, whether the action is based upon wilful neglect or not. Shearman & Redfield, § 37, say: "Where the defendant has wilfully committed an injury the rule" of contributory negligence does not apply.

In the case of The Tonawanda R. R. Co. v. Munger, 5 Denio, 267, it is said: "Injuries inflicted by design are not thus excused. A wrong doer is not necessarily an outlaw and may justly complain of wanton or malicious mischief."

And we think, as held in that case, where an injury is effected or results from an act which is either criminal or calculated to endanger human life, and it is the result of wilful neglect of a party, he should not be excused by the contributory negligence of the person injured unless under circumstances similar to those indicated. Sandford, adm'r, etc., v. Eighth Ave. R. R. Co., 23 N. Y. 343. But where the proof shows gross or a less degree of neglect the law of contributory negligence should be given to the jury, if there be any evidence on which to base it.

Question No. 2 asked by appellant was too broad. It is not necessary, in order to render appellant responsible, to be shown that it could not, after discovering appellee's condition, have avoided the injury by proper care.

For it may be that appellant's own negligence rendered it impossible for it or its agents to discover any fault of appellee before he

was injured, or to take any care whatever to protect him from his own negligence, or that the appellant's agent took no care to keep advised of appellee's act or to become aware of any negligence he may have been guilty of.

We do not understand the law to be that the party charged with gross neglect is relieved from responsibility in every case by the contributory negligence of the injured party, unless he had actual notice of the injured party's fault in time to protect him. If the appellee, by his own negligence, contributed to such an extent to produce the injury to himself, that but for his negligence it would not have happened, then he has no cause of action, unless the appellant's agent, in managing and coupling the train, knew or could have known by ordinary attention of the peril in which appellee's negligence had placed him and failed to observe reasonable care to avoid the injury which followed. Shearman & Redfield, §§ 24, 25; Paducah & Mem. R. R. Co. *v.* Hoehl, 12 Bush, 41, and cases there cited.

The evidence in this case, which we have refrained from reciting because a new trial must be ordered, was such as to authorize the court to instruct the jury on the law of contributory negligence as above defined. As to the question of excessive damages raised by appellants, it might be imprudent to discuss it in the light of the evidence, and in contemplation of a new trial. It is proper, however, to decide that exemplary, vindictive or punitive damages may be given where a personal injury has been caused by gross negligence, but nothing less in the management of railroad trains. Maysville & Lexington R. R. Co. *v.* Herrick, 13 Bush, 122; Kentucky Central R. R. Co. *v.* Dills, 4 Bush, 593.

As the evidence may present a different state of case at another trial we will not consider this point further, or go into the question as to how much or when compensatory damages are proper. We have considered questions in this opinion on which alone we would not have based a reversal, but as the record involved them and the whole law of the case should be understood as to both sides, we have ventured upon their consideration.

Wherefore, for the errors indicated to appellant's prejudice, the judgment is reversed and cause remanded with directions to grant a new trial.

As to injuries received while coupling cars see Romick, Adm'r *v.* Chicago, R. I. & P. R. Co., and note, supra; Tierney *v.* Burlington, C. R. & N. R. Co., and note, supra; Houston & T. C. R. Co. *v.* Pinto, infra.

Houston and Texas Central R. Co.

v.

Pinto.

(*Advance Case, Texas. Dec.* 3, 1883.)

Plaintiff, a brakeman in the employ of the company defendant, was injured while coupling cars at night by falling into a ditch across the track. The evidence was conflicting as to how far plaintiff knew or had been warned of the danger, and as to the condition of the track. An action being brought against the company to recover damages, and a verdict being rendered for plaintiff.

***Held*, that the verdict would not be disturbed.**

An assignment of error which refers to the whole charge is too vague.

Appeal from Grayson County.

R. De Armond for appellant.

A. E. Wilkinson for appellee.

The plaintiff in the court below, E. J. Pinto, brought this suit against the Houston & Texas Central Ry. Co. to recover damages for personal injuries sustained by him on January 24, 1878, in the Denison yard, in Grayson county, while in the employ of defendant as brakeman and switchman for night work. He received his injury while in the act of making a coupling, and the petition alleges that it occurred by his stepping into an open ditch in the yard, of the locality and existence of which he was ignorant, and that in the act of falling, to save himself from being thrown under the cars, he was thrown on, to, and against the cars, so that his hand came between the dead-wood, or bumpers of two cars in motion, and was crushed, necessitating amputation. It is alleged as negligence in defendant that the ditch, or hole into which plaintiff stepped, was permitted to be in defendant's yard, and generally, that defendant's yard at Denison was rough, uneven, and not kept in a safe condition. Damages laid at $5000.

The defense was general denial, and specially, that plaintiff was well aware of the locality of the ditch; that the ditch was necessary for proper drainage of the yard; that the yard was in good, safe repair, and that plaintiff's negligence contributed to and occasioned his injury, and that if the ditch was negligently put in the yard, and improperly kept, it was without the knowledge of defendant, and the act of a fellow-servant of plaintiff. The result of the trial was a verdict and judgment for plaintiff for $5000.

The case comes here upon writ of error.

The assignments of error are as follows:

1. Error in clauses 1, 2, 3, 4, 5, and 6 of the charge. These compose the entire charge.

2. Error in refusing charges asked by defendant numbered 1, 2, and 3. These are all the charges asked.
3. Error in refusing a new trial.
4. The verdict is contrary to the law.
5. The verdict is contrary to the evidence and is excessive.

DELANY, J.—The first four assignments of error are so vague as to amount to a waiver of errors. Rule 26, Supreme Court, 47 Tex. 602. We will, therefore, consider whether the verdict is sustained by the evidence. It appears from the testimony that in January, 1877, appellee was employed in the yard of appellant, in the city of Denison, his duty being to attend to the switching, coupling, etc., of its cars. His duties were performed only at night. On the third night after he was employed, while acting under the orders of the night superintendent, he, with a lighted lamp on his left arm, made an attempt to couple the cars of a train, and failing at the first attempt he advanced with the train, which was moving slowly, and when they again came together he made a second attempt, and in doing so stepped into a ditch which ran across the road under the track. He threw out his right hand to save himself from falling under the train, when it was caught between the cars and crushed so as to render amputation necessary. The ditch was about twelve inches deep, and from twelve to eighteen inches in width. He testified that he knew nothing of the presence of this ditch, having never been in that part of the yard before, and that he had never been in the yard at all in the daytime. He had been employed many years in a similar business at other places, and appears to have been familiar with his duties; was about thirty-five years old. Best, the night superintendent, thought that he had warned appellee about the ditches, as such had been his habit with new employees generally. He further states just as the plaintiff was making the second attempt to couple the cars he "told him to watch out for the ditch and the dead-woods." Plaintiff answered, "I am." Immediately afterward the accident happened. He also states that the plaintiff had worked in the same part of the yard on the previous nights. Another witness, who had worked in the yard, states that the plaintiff was not working near the ditch on the two preceding nights, but in another part of the yard. He states, also, another ditch crossed the track near the one into which the plaintiff stepped, but the other one was covered with plank at the place where it crossed the track, but this one was left open. He called the attention of the section boss to this open ditch, but does not recollect whether it was before or after the accident. Another witness, after describing the condition of the ground at the time of the accident, says, that in a few days after it occurred the defendant "began to fill up the yard; that is, box up the ditches and fill up between the ties." There was a considerable

degree of conflict in the testimony as to the condition of the road-bed, some stating that it was very bad; others, that it was as good as any they had ever known. John R. Wright, the yardmaster, testified that the ditch into which the plaintiff fell had been placed there by the section boss for the purpose of giving surface drainage to the yard. Witness thought the ditch necessary for that purpose; did not think that G. A. Quinlan, the division superintendent, knew of its existence, or had ordered its construction. It was the duty of the section boss to keep the yard and track in proper repair. Neither Quinlan, nor the section boss, testified in the case, though Wright stated on cross-examination that he had seen Quinlan about the yard. In this conflict of evidence we are not prepared to say that the verdict of the jury was clearly wrong, and taking the case of R. R. Co. *v.* Randall, 50 Tex. 254, as our guide, we cannot say that it was excessive.

Affirmed.

As to injuries received while coupling cars, see Romick, Adm'r v. Chicago, R. I. & P. R. Co., and note, supra; Tierney v. Burlington, C. R. & N. R. Co., and note, supra, and Louisville.

ROMICK, Adm'r, etc.,

v.

CHICAGO, R. I. AND P. R. CO.

(*Advance Case, Iowa. December* 5, 1883.)

Contributory negligence of the party injured will not prevent recovery, if such negligence be known to the party causing the injury, and could be avoided by the use of reasonable care.

It is negligence for those in charge of a train to back it against other cars, except on the signals of the brakeman attempting to couple them, it being usual to move the train in such cases only on signal from the brakeman.

APPEAL from Madison Circuit Court.

Action to recover for personal injuries, sustained by plaintiff's intestate, while in the service of defendant as a brakeman, which resulted in his death. The cause was tried to a jury, and upon the close of plaintiff's evidence the circuit court directed the jury to return a verdict for defendant, whereon a judgment was entered. Plaintiff appeals.

A. R. Smalley and Bryan & Bryan for appellant.

Wright, Cummins & Wright for appellee.

BECK, J.—The plaintiff's intestate was in the employment of defendant as a brakeman upon its railroad. In coupling a dining car to the "caboose" of a freight train, to be drawn from Atlantic

to Council Bluffs, he received injuries that caused his death. The "caboose" had a "bumper" of ordinary construction, and the dining car was provided with a Miller's coupler. The deceased went between the cars, where he made the attempt to couple them, but the "bumper," upon striking Miller's coupler, slipped aside and ran under the platform of the dining car, crushing deceased, and killing him almost instantly. It is alleged that defendant's employees were negligent upon various grounds; one only need be mentioned, namely, in signaling the person in charge of the engine to move backward in order to make the coupling, while deceased was between the cars preparing therefor, without a signal from him.

The evidence shows that prior to the attempt to couple the cars the train was backed and stopped so that the "caboose" was within six feet of the dining car when deceased went between the cars to make the coupling, which was delayed by reason of difficulty in removing a coupling-pin, and the necessity of procuring another. The evidence tended to prove that in making a coupling of cars of the construction of those in question, the person charged with the duty usually stands between the cars, and the cars are moved, only upon his signals, and that the deceased did not signal or in any manner direct the train to be backed when he received the fatal injury. The circuit court directed the jury to find a verdict for defendant upon the grounds that the evidence failed to show that defendant was negligent, and did show that the deceased contributed to his injury by his own negligence. We think in the ruling there is manifest error.

The evidence tended to show negligence of defendant's employees in moving the train without the direction of deceased. Under the proof it should not have been "backed" until deceased should have so directed. He was authorized to believe that the train would not be moved until he was ready, and should so signal. But it is urged that deceased contributed to the injury by his negligence in going between the cars, being warned of the danger by a fellow-employee. If this position be found to be supported by the evidence, it is answered by the consideration that the evidence tended to show plaintiff's employees, who directed the train to be moved, had knowledge of the alleged negligence of deceased in going between cars. Under a familiar rule recognized by this court, contributory negligence of the person injured will not excuse the other negligent party, if the contributory negligence be known to him, and he could have avoided it by the exercise of reasonable care. There being evidence upon the questions of the negligence of the parties, and the knowledge of the co-employees of the deceased of his negligence, if he was guilty of any, these questions, under repeated ruling of this court, should have been submitted to the jury.

On account of the error in withdrawing the case from the jury, the judgment of the circuit court will be reversed, and the cause remanded for a new trial.

As to injuries received while coupling cars, see Hathaway v. Michigan Central R. R. Co., 12 Am. & Eng. R. R. Cas. 249, and note.

See also Missouri Pac. Ry. Co. v. Lyde, 11 Am. & Eng. R. R. Cas. 188; Fay v. Minneapolis & St. L. R. Co., 11 Am. & Eng. R. R. Cas. 193; Watson v. H. & T. C. R. Co., 11 Am. & Eng. R. R. Cas. 213; Lake Erie & W. R. R. Co. v. Everett, 11 Am. & Eng. R. R. Cas. 221; Baird v. Chicago, R. I. & P. R. Co., 12 Am. & Eng. R. R. Cas. 75; Skellinger v. Chicago & N. W. R. Co., 12 Am. & Eng. R. R. Cas. 206; Whitman v. Wisconsin & M. R. Co., 12 Am. & Eng. R. R. Cas. 214; Northern Central R. R. Co. v. Husson, 12 Am. & Eng. R. R. Cas. 241; Brown v. Atchison, T. & S. F. R. Co., supra; Burlington, etc., R. R. Co. v. Coates, supra; Tierney v. Burlington, C. R. & N. R. Co., infra; Louisville & Nashville R. Co. v. McCoy, infra; Houston & T. C. R. Co. v. Pinto, infra.

TIERNEY
v.
BURLINGTON, C. R. AND N. RY. CO.

(*Advance Case, Minnesota. November* 21, 1883.)

In an action brought by a brakeman against a railroad company to recover damages for injuries sustained by him while coupling cars, the complaint averred that the accident was caused by reason of the draw-bars being "loose, defective and insufficient." The court on motion of defendant refused to strike out the words "defective and insufficient" as irrelevant and redundant and refused to make an order that as to said words the complaint be made more definite and certain. *Held*, that the action of the court was proper.

APPEAL from Freeborn County.

J. D. Springer for appellant.

Lovely and Morgan for respondent.

BERRY, J.—This is an action in which plaintiff seeks to recover for injuries received by him while coupling two cars together as defendant's employee. As negligence on defendant's part he alleges that "the draw-bars" of "the coupling appliances of the two cars were not properly fastened, and were loose, defective, and insufficient, and on account thereof would not and did not remain in their proper places when said cars were driven together, as was usual and necessary in making said coupling," and in consequence thereof he was injured. The defendant moved to strike out the words "defective and insufficient" as irrelevant and redundant, or that as to them the complaint be made more definite and certain. From a denial of the motion defendant appeals.

Irrespective of the discretionary nature of the action of a district court upon motions to strike out or make more definite, we have no doubt whatever that the denial was entirely right. As respects the words objected to, the plain meaning of the complaint is that the draw-bars of the two cars which plaintiff was coupling were defective and insufficient in such a way that they would not and did not remain in their proper places when the cars were driven together, as usual and necessary in such cases, etc. Notwithstanding the affidavit made by one of defendant's attorneys to the contrary, this appears to us to describe (by reference to their effect) the defectiveness and insufficiency complained of with a practical definiteness which it would not be easy to surpass. It distinctly apprises defendant of what it must be prepared to meet, and with all reasonable particularity. The order appealed from is accordingly affirmed.

We observe that of late appeals of this kind, often utterly without merit and purely dilatory, are becoming so frequent as to occasion regret that the statute allows them. This is really an abuse of the right of appeal to this court, and while it may not be in our power to enforce a remedy, it is to be hoped that it will not be continued.

As to injuries received while coupling cars see Hathaway *v.* Michigan Central R. R. Co., 12 Am. & Eng. R. R. Cas. 249, and note. See also Missouri Pac. Ry. Co. *v.* Lyde, 11 Am. & Eng. R. R. Cas. 188; Fay *v.* Minneapolis & St. L. R. Co., 11 Am. & Eng. R. R. Cas. 193; Watson *v.* H. & T. C. R. R. Co., 11 Am. & Eng. R. R. Cas. 213; Lake Erie & W. R. R. Co. *v.* Everett, 11 Am. & Eng. R. R. Cas. 221; Baird *v.* Chicago, R. I. & P. R. Co., 12 Am. & Eng. R. R. Cas. 75; Skellenger *v.* Chicago & N. W. R. Co., 12 Am. & Eng. R. R. Cas. 206; Whitman *v.* Wisconsin & M. R. Co., 12 Am. & Eng. R. R. Cas. 214; Northern Central R. R. Co. *v.* Husson, 12 Am. & Eng. R. R. Cas. 241; Brown *v.* Atchison, T. & S. F. R. Co., supra; Burlington, etc., R. R. Co. *v.* Coates, supra; Romick, Adm'r *v.* Chicago, R. I. & P. R. Co., supra; Louisville & Nashville R. Co. *v.* McCoy, infra; Houston & T. C. R. Co. *v.* Pinto, infra.

McLeod, Receiver,

v.

Ginther's Adm'r.

(80 *Kentucky Reports*, 399.)

The court adheres to the doctrine that all declarations made at the same time the main fact under consideration takes place, and which are so connected with it as to illustrate its character, are admissible as original evidence, being a part of the res gestæ or a part of the thing done.

The declarations of Fish, the engineer, were made at the time of the collision or a few moments afterwards, when there was no time to contrive or

devise a falsehood, and during the search for the victims of the accident. They are a part of the res gestæ, and competent as original evidence in the case.

The General Statutes, chapter 57, section 8, gives a cause of action to the widow of decedent for the wilful neglect of the company, or its agents and employees, which resulted in his death, although he was an employee of the company.

It is not material whether declarations constituting a part of the res gestæ were uttered by one or the other of appellant's employees.

Even though Fish and decedent agreed in misconstruing the dispatch which seems to have caused the collision, yet, if the language and figures contained in it were such as to mislead, appellee had a cause of action.

The evidence was sufficient to maintain the action.

APPEAL from the Jefferson Circuit Court.

W. P. D. Bush and A. Barnett for appellant.

The declaration of Fish, "I had until 10.10 A.M., to make Beards," is not admissible or competent as a part of the res gestæ.

It was not made at the time the collision took place.

The statement was not made at the same time the instructions were given.

The statement was made by Fish as the agent or servant of the receiver.

As between Fish and Ginther and appellant, Fish was the agent of Ginther, and not the agent of the defendant, the receiver.

As to this matter they were equals, and bound for proper skill in understanding orders given in the usual way. 17 N. Y. 131; 1 Greenleaf on Evidence, sec. 13; 4 Wend. 396; 2 Hill, 445; Story on Agency, secs. 135–6; 10 Ves. 128; 4 Kerr, 271; 9 Gray, 243; 57 Pa. 339; 20 Wall. 528; 26 Grattan, 350; 36 Am. R. 825; 15 W. Va. 628.

The statements or declarations of one co-equal fellow-servant of a railroad company are not competent as original evidence on behalf his co-equal fellow-servant in the same service on the same train. L. & N. R. R. Co. *v.* Collins, 2 Duv. 114; Ibid. *v.* Cavans, 9 Bush, 559; Thompson on Negligence, secs. 26, 27, 38; Shearman & Redfield on Neg., secs. 86, 100, 105, 108, 109, 110; Story on Agency, secs. 183, 210, 217.

The evidence did not sustain the verdict. 10 Bush, 667; 2 Duv. 577; 9 Bush. 522.

W. Lindsay, I. H. Trabue, and S. F. J. Trabue for appellee.

The exclamation of Fish was certainly made within ten seconds after the collision. Both were substantially simultaneous.

The declarations of a person at or immediately following an act in which he participates are admissible as substantive evidence, and are in the nature of verbal facts. 3 A. K. Mar. 395; 2 J. J. Mar. 384; Billings *v.* Sherley, 8 Bush, 154; Mockabee *v.* Common-

wealth, 78 Ky. 380; 3 Cush. (Mass.) 181; 8 Wall. 397; 55 Peen. 402; Greenleaf, sec. 169; 11 Bush, 105; 13 Barb. 246; 5 Y. R. 512; 8 Watts, 355; 1 Key's N. Y. 390; 4 Caldwell, 161; 18 Gratt. 943; 32 Ib. 672.

HARGIS, C. J.—The petition for rehearing demonstrates that some of the principles of law laid down in the opinion were erroneously and unnecessarily applied to the facts of this case.

For the purpose of eliminating the dictum of the former opinion, which is withdrawn, and of answering new views presented by the well prepared petition for rehearing, it becomes necessary to restate the facts and law of this case, which we will do by using the language of the former opinion, so far as adhered to, and making such observations as the position now taken by counsel may require.

This was an action to recover damages for the wilful neglect of the appellant's servants in sending dispatches to two conductors of trains which were to run on the same day, over the same part of its road.

The appellant denied any fault on the part of its servants in sending or wording the dispatches, and pleaded contributory negligence of the appellee's husband.

The jury, under proper instructions, found a verdict for the sum of $7500 in favor of the appellee, and the appellant took an appeal, on which we are asked to reverse the judgment rendered in accordance with the verdict.

The dispatches were alike, and read this way:

"No. 103, I. E. R., N. Y., 4. 13:

"Fish extra east; can have until ten, 10, o'clock A.M. to make Beards for Number 2 and Number 4."

Fish, construing the dispatch to mean that he had until ten minutes after ten o'clock to reach Beards' Station, started east on an engine, with no train attached, and when in about one mile of that place, at seven minutes after ten o'clock, met and collided with train Number 2, going west, each running at the forbidden rate of near forty miles an hour, and the appellee's husband, John Ginther, and two other persons were killed.

Fish was conductor and Ginther engineer on the engine going east.

The appellee introduced as a witness Waters, the engineer on the west bound train at the time of the collision, who testified, as shown by the following questions and answers taken from the stenographer's report of the evidence:

Questioned by plaintiff's counsel:

"*Q.* Who was the conductor on the train Ginther was on?

"*A.* Mr. Fish.

"*Q.* Did you see him?

"*A*. Yes, sir.

"*Q*. How long after the collision?

"*A*. He was the first man I met.

"*Q*. How soon was that?

"*A*. Well, when I gathered myself together I was on the right hand side coming this way, and I saw the engines were pushing out to the left, and I went out behind the train to look for my fireman, when Mr. Fish he said—

"Counsel for the defendant objects to the witness stating what Mr. Fish said. Objection overruled, to which ruling of the court the defendant excepts.

"What did you say to Fish and what did Fish say to you concerning the collision?

"*A*. Well he was the first man I met. He came up to me and commenced pulling out his watch, and says, 'What time have you got?' I says, 'I have no time to compare time now; there is my conductor.' He says, 'I had until 10.10 to make Beards.' I says, 'No, you had not.' He went on to my conductor, and that is all that passed between us at that time."

The appellant insists that the statement of Fish that "I had until 10.10 to make Beards" was incompetent, because not a part of the res gestæ.

What constitutes res gestæ is often difficult to determine, as the relationship of facts, when the thing done is composed of different agencies and actions, separated more or less in the point of time and manner of performance, is not always palpable, and though necessary, may frequently be obscured by the multiplicity of particles which go to make up the main fact under consideration. 1st Greenleaf, section 108. Hence the particular facts of each case must determine the relevancy of declarations sought to be proven as part of the act or facts constituting and legally belonging to the cause of action.

We have been cited, and still adhere to, the rule on the subject laid down in the case of Dills *v*. May, in which it is said: "The general rule is that all declarations made at the same time the main fact under consideration takes place, and which are so connected with it as to illustrate its character, are admissible as original evidence, being what is termed a part of the res gestæ; in other words, a part of the thing done."

Two things unite to constitute a cause of action in this case. First, the injury to appellee's husband; second, the acts which began with the sending of the several dispatches resulted in their misconstruction, and ended with the accident and its attendant circumstances.

Anything that was said during the time these facts took place, which was so connected with them as to illustrate their true character, belongs to the res gestæ, and may be proven as original evi-

dence. In the case of Hanover R. R. Co. *v.* Coyle, 55 Penn. St. 402, where a peddler's wagon was struck and the peddler injured, by the negligence of the engineer, the latter's declaration, made after the infliction of the injury, was admitted as a part of the transaction itself, the court saying:

"We cannot say that the declaration of the engineer was no part of the res gestæ. It was made at the time—in view of the goods strewn along the road by the breaking up of the boxes—and seems to have grown directly out of and immediately after the happening of the fact."

This case is in point and is supported by high authority.

Lord Chief Justice Holt, in an action for assault and battery of the wife, in the case of Thompson and Wife *v.* Trevanion, Skinner, 402, permitted "what the wife said immediately upon the hurt received, and before that she had time to contrive or devise anything for her own advantage, to be given in evidence." Also see Aveson *v.* Kincaid, 6th East; King *v.* Foster, 6th Carrington and Payne; Commonwealth *v.* Pike, 3 Cushing; Rawson *v.* Haigh, 2 Bingham; Beaver *v.* Taylor, 1st Wallace; Insurance Company *v.* Mosley, 8th Wallace.

Mr. Starkie says: "If the declaration has no tendency to illustrate the question, except as a mere abstract statement detached from any particular fact in dispute, and depending for its effect entirely on the credit of the person making the declaration, it is not admissible. But if any importance can be attached to it as a circumstance deriving a degree of credit from its connection with the circumstances of the case, independently of any credit to be attached to the speaker or writer, then the declaration is admissible."

It was important to show what Fish and Ginther thought of the meaning of the dispatch while they were acting under it, as the negligence in this case consists of the wording of the dispatch so as to mislead them, they being bound, by the rules of the company, to understand it alike before acting under it.

The declarations of Fish were made within a few seconds after the casuality, in view of the wrecked train, and amidst the search for persons whose fate was then unknown, and while Ginther, who lived but thirty minutes, was dying from the injuries he had received.

He had no time to contrive or devise a falsehood by which to exonerate himself from blame, and his declaration was so connected with the circumstances then surrounding him, and which form a part of this case, as to give it importance in determining the fact that he and his engineer had run the engine in the honest belief that they had until ten minutes after ten o'clock to reach Beard's Station.

The declaration related alone to the declarant's state of mind

when he received the dispatch, and the continuance of that state of mind while he was acting under it, and it was made before the expiration of the fatal ten minutes in question, and prior to any knowledge on his part that he, and not the agents on the westbound train, had misconstrued the dispatch, the first information of that kind being communicated by Waters' response, "No, you had not," to his declaration. Therefore, if we ignore the credit to which Fish may have been entitled as a truthful man, his declaration, made under the circumstances, impresses the mind with confidence in its truth, and is entitled to be given its weight as any other fact going to make up the whole transaction.

The fact that Fish and Ginther acted under the dispatch as giving them ten minutes after ten o'clock to reach Beard's, shows that they put that construction on it, and increases confidence in Fish's declaration, which was a part of the res gestæ, and therefore admissible evidence.

It is contended that Fish and Ginther were co-equal fellow-servants, and for that reason their declarations were inadmissible for each other, and the company not bound for the negligence of one that resulted in injury to the other.

This position is not correct, because section 3 of chapter 57, General Statutes, as shown by the petition for rehearing, gives a cause of action to the widow of Ginther for the willful neglect of the company, or its agents and employees, which resulted in his death, although he was an employee of the company.

And we do not see that it makes any difference whether declarations constituting a part of the res gestæ were uttered by one or the other of these employees, as, when made as a part of the thing done, they cease to be mere heresay, and are invested with the characteristics of a fact, hence become an appreciable element of the main fact under consideration. The appellee had the right to recover for the death of her husband, even if Fish and Ginther did agree in the wrong construction of the dispatch if the language and figures of the dispatch were such as to mislead them, notwithstanding they used ordinary care in deciphering and reading it, and to amount, in connection with all the facts of the case, to willful neglect on the part of the company and its agents.

It is now urged that the evidence was insufficient to authorize the verdict, and that the court below ought to have instructed the jury to find as in case of non-suit.

It is admitted that the jury were properly instructed; therefore, unless their verdict is palpably against the weight of the evidence, this court cannot disturb it.

It must be concluded from the evidence that Fish and Ginther misconstrued the dispatch, and the train dispatcher intended to inform each conductor that the trains had only until ten o'clock to make Beard's, and the question of willful negligence turns upon

the manner of wording the dispatch, the rules regulating the mode of dispatching, and the excessive rate of speed at which the trains were being run.

It is proven that, under the rules of the company, time may be repeated in a dispatch as a precaution against misapprehension, and that figures may be used in the repetition.

Whether Fisk and Ginther were schooled in the rules so as to enable them to avoid such a mistake as they so unfortunately fell into, does not appear. The rules change the ordinary meaning of the language and figures which were used in the dispatch, and substitute for them an artificial signification likely to be productive of misunderstanding amongst the employees. The adoption of such rules showed a want of care by the company for the lives of those in its employment who were required to act under them.

The rules do not authorize the word "ten" to be followed by the figures "10" without brackets, as was done by the train dispatcher, and which was certainly the immediate cause of the disaster.

Had brackets been used, or the words spelled in full, and no figures used, a misconstruction could hardly have been made; and it was proven that the trains were run at a greater rate of speed than authorized by the rules of the company. Whether this in fact contributed to the disaster, it at least showed a want of care by the conductors in charge of the trains, amounting to gross negligence, and goes to make up the dereliction of duty charged upon the company. When it is considered that the train dispatcher, although he intended otherwise, so wrote the despatch as to mislead Fish and Ginther, it cannot be soundly argued that his act did not amount to willful neglect, because he did not intend to mislead them, for he willfully worded the dispatch; he knowingly used language and figures without any brackets, calculated to result in misleading, and his act did mislead Fish and Ginther, and we are therefore of the opinion that his intentional omission of such precautionary signs or words in the dispatch as any person of ordinary prudence would have used, whether contrary to or in pursuance of the rules, amounted to willful neglect, for which the company is responsible, unless the deceased, knowing the rules and understanding the dispatch, willfully undertook the journey.

The evidence fails to show that he was guilty of such suicidal recklessness, or that the proximate cause of his death consisted in anything else than the negligently worded dispatch.

Wherefore the judgment is affirmed.

See the original opinion in this case, 8 Am. & Eng. R. R. Cas. 162, and note where the authorities upon the points touched on are collected.

Declarations.—As to the admissibility of declarations as part of the res gestæ, see McDermott *v.* Hannibal, etc., R. R. Co., 2 Am. & Eng. R. R. Cas. 85; Pittsburgh, C. & St. L. R. Co. *v.* Wright, 5 Am. & Eng. R. R. Cas. 628;

Pennsylvania Co. v. Rudel, 6 Am. & Eng. R. R. Cas. 30; Adams v. Hannibal & St. Joe R. R. Co., 7 Am. & Eng. R. R. Cas. 414; Meyer v. Virginia, etc., R. R. Co., 9 Am. & Eng. R. R. Cas. 175; Moore v. Chicago, etc., R. R. Co., 9 Am. & Eng. R. R. Cas. 401; Cure v. Chicago, R. I. & P. R. Co., 11 Am. & Eng. R. R. Cas. 85; Dietrich v. B. & H. S. R. Co., 11 Am. & Eng. R. R. Cas. 115; Louisville, etc., R. R. Co. v. Henly, 12 Am. & Eng. R. R. Cas. 301.

Telegrams.—As to injury to servants by reason of error in telegraphing or the like see Slater v. Jewett, 5 Am. & Eng. R. R. Cas. 515; Chicago, etc., R. R. Co. v. Doyle, 8 Am. & Eng. R. R. Cas. 171; Robertson v. T. H., C. & Ind. R. R. Co., 8 Am. & Eng. R. R. Cas. 175; Wabash R. Co. v. McDaniels, 11 Am. & Eng. R. R. Cas. 158; Shehan v. New York Central & H. R. R. Co., 12 Am. & Eng. R. R. Cas. 235; Dawson v. Eastern R. Co., 58 N. H. 129; C., B. & Q. R. R. Co. v. McLellan, 84 Ill. 109.

Blessing
v.
St. Louis, Kansas City and Northern Ry. Co.

(77 *Missouri Reports*, 410.)

In an action against a railroad company to recover for the death of a locomotive engineer killed while on duty, through the negligence of the train dispatcher, the plaintiff failed to show that the train dispatcher and the engineer were not fellow-servants. *Held*, that for this omission the plaintiff was properly non-suited.

Error to St. Louis Court of Appeals.
A. R. Taylor for plaintiff in error.
Wells H. Blodgett and Prosser Ray for defendant in error.

Henry, J.—This is an action by which plaintiff seeks to recover the statutory penalty of $5000 for the death of her husband, Charles W. Blessing, which occurred under the following circumstances:

Blessing was an engineer in the employment of defendant, and, on the morning of the 28th of November, 1877, left Moberly in charge of his engine with a train of which one Austin was conductor. West of Moberly, at coal mine No. 2, they passed a work train under the charge of one Johnson. At mine No. 2 there were side-tracks, but there was no telegraphic communication between mine No. 2 and Kansas City, the western terminus of defendant's road, or Moberly, or any other station on the road, which fact was known to Blessing. Austin's train went to Brunswick, forty miles west of Moberly, and at three o'clock that same afternoon, Austin and Blessing started back to Moberly on another train, an extra. Before reaching Huntsville, a station six miles west of Moberly, and two miles west of mine No. 2, they received

an order from the train dispatcher at Kansas City to run to Moberly, avoiding regular trains, and to look out for Johnson between mine No. 2 and Huntsville. They arrived at Huntsville, and after whistling as many as twenty times to notify Johnson, they pulled out for Moberly, and when going around a curve, between Huntsville and mine No. 2, without sending flagmen ahead, or taking any other precaution to avoid a collision with Johnson's train, except to run their train at a slow rate of speed, six miles an hour, the trains collided with each other about 5:40 o'clock, P.M., and Blessing was killed.

Johnson testified that he had no orders in regard to this extra train, and that he should have been notified of it; that his waiting orders were between Huntsville and mine No. 2, avoiding regular trains, flagging against two extras going west; that he was running at a speed of twenty miles an hour, when he was apprised of the approach of Austin and Blessing's train by sparks from the smoke stack; that he whistled for brakes, had the tender brake set, reversed the engine full stroke, and threw the throttle wide open, and that his engine was running at a speed of ten miles an hour when the collision occurred.

The court gave an instruction to the effect that on the evidence plaintiff could not recover, and that presents the only question for consideration.

Evidently the injury to plaintiff was mainly, if not entirely, occasioned by the neglect of the train dispatcher at Kansas City to notify Johnson of Austin's extra train, if such was his duty. If it was his duty, Austin and Blessing had a right to act on the supposition that such notice had been given, and would not be held to the same care as if they had known it had not been given, or that no such duty rested upon the train dispatcher. If Johnson had known that Austin's train was coming east, and had run as cautiously as Blessing was running, six miles an hour, the collision would not have occurred, if he had used the same precautions to avoid it which he did employ when he discovered Austin's train. He could, and probably would have discovered the approach of that train at the same point as when running twenty miles an hour, and it is in proof, that after he discovered Austin's train, he reduced the speed of his train from twenty to ten miles an hour.

Whether Austin and Blessing were prudently running their train, is to be determined from all the facts and circumstances of the case, and inasmuch as we cannot, on the evidence, say they were not managing their train prudently, there would have been error in the instruction given, but for another question involved. If the death of Blessing was occasioned by the neglect or carelessness of a fellow-servant, the defendant is not liable; and in McGowan *v.* St. L. & I. M. R. R. Co., 61 Mo. 528, this court, Hough, J., de-

livering the opinion, said: "Prima facie, all servants of a common master employed in running, operating and rendering service with a train of cars, are fellow-servants." The train dispatcher, it seems from the meagre evidence on the subject, preserved by the bill of exceptions, controls the movements of trains, and the conductor has far less discretion than he as to when he shall start, where he shall stop, and how he shall run his train. It was observed in the case of McGowan v. Railroad Co., supra, that "if there are facts which show that this relation (that of fellow-servant) does not really exist between all of such servants, the burden of showing such facts is on him who seeks to avail himself of the absence or non-existence of such relation." No such testimony was offered on the trial of this cause, and the failure on the part of the plaintiff, by testimony, to show that Blessing and the train dispatcher were not fellow-servants warranted the instruction given by the court, and for that reason the judgment is affirmed.

All concur.

Fellow-Servants.—An engineer or fireman of a railroad train is a fellow-servant of a train dispatcher. The company is not therefore ordinarily liable for the death or injury of the former occasioned by the negligence of the latter. Slater v. Jewett, 5 Am. & Eng. R. R. Cas. 515; Chicago, etc., R. Co. v. Doyle, 8 Am. & Eng. R. R. Cas. 171; Robertson v. Terre Haute, etc., R. Co., 8 Am. & Eng. R. R. Cas. 175; Rose v. Boston & Albany R. R. Co., 58 N. Y. 217; Hodgkins v. Eastern R. R. Co., 119 Mass. 419. But a train dispatcher may be vested with such powers as will make him a vice-principal; in which case, of course, the company will be liable for his negligence. Flike v. Boston & Albany R. Co., 53 N. Y. 549; Booth v. Boston & Albany R. R. Co., 73 N. Y. 38; McCosker v. Long Island R. R. Co., 21 Hun. 500.

ELMER
v.
LOCKE.

(135 *Massachusetts Reports*, 575.)

A brakeman in the employ of a railroad corporation may maintain an action against the corporation for personal injuries occasioned, while in the exercise of due care, by the fall of a trestle-work supporting a portion of a spur track, which was intended for use for an indefinite period of time, if the fall is caused partly by the defective construction of the trestle-work, and partly by negligence of the fellow-servants of the plaintiff.

TORT against the manager of the Troy and Greenfield Railroad and Hoosac Tunnel, for personal injuries received by the plaintiff, a brakeman, while in the employ of the defendant. At the trial in the Superior Court, before Staples, J., the jury returned a ver-

dict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

J. A. Aiken for the defendant.

S. T. Field for the plaintiff.

DEVENS, J.—There was evidence that the plaintiff was in the exercise of due care as a brakeman on the defendant's railroad; that a spur track, which had been in use for more than a year, led from the main line, and had been constructed for the purpose of approaching a stone-crusher and bringing therefrom stone, which had been broken, to ballast the tracks of the railroad; and that the falling of the trestle-work which supported a portion of this spur track, upon which the cars stood, and which was constructed for them to stand upon after they were loaded and before they were drawn away by the locomotive engine (which fall was the cause of the injury to the plaintiff), was occasioned by the defective construction of the trestle-work.

Apparently the train escaped from proper control by neglect of some of those who had the management of it, and who were fellow-servants of the plaintiff, engaged in the common employ of conducting it. This would not be sufficient to excuse the defendant, if he was in fact responsible for the defective construction of the trestle-work. It does not exonerate him from the consequences of failure in the performance of his duty, if such failure contributed to the injury, to show that, if others for whom he is not responsible had performed their duty, the injury would not have occurred, or that it might have been avoided by care and vigilance on the part of those who were clearly the fellow-servants of the plaintiff in the transaction. Cayzer *v.* Taylor, 10 Gray, 274, 281; Eaton *v.* Boston & Lowell Railroad, 11 Allen, 500; Simmons *v.* New Bedford, Vineyard & Nantucket Steamboat Co., 97 Mass. 361, 368; Lane *v.* Atlantic Works, 111 Mass. 136.

The contention of the defendant is, that he is not responsible for the defective construction of this spur track, it not being shown that he failed to employ suitable persons or to provide suitable materials therefor; that if there was negligence therein, it was that of a fellow-servant of the plaintiff, engaged in the same general business with him; and that he cannot recover, as it was one of the ordinary risks of the employment in which he engaged, and for which he must be deemed to have received compensation.

While it is well settled that, if a master uses reasonable care in the selection of his servants, and in supplying and keeping in repair suitable structures, and in giving proper directions and taking due precautions as to their use, he is not responsible to one servant for the negligence of another in the management and use of such structures in carrying on the master's work, it is equally

clear that he is bound to use reasonable care to keep the engines with which, and the buildings, places and structures in, upon or over which, his business is carried on, in a fit and safe condition, and that he is liable to any of his servants for injuries suffered by reason of his negligence. Nor can he escape responsibility where it is his duty to supply suitable structures, instrumentalities, or appliances, by proving that he delegated to a proper agent their construction, superintendence, or repair. Holden v. Fitchburg Railroad, 129 Mass. 268; s. c., 2 Am. & Eng. R. R. Cas. 94.

The defendant deems that these principles apply here, and seeks to bring the case at bar within that class of cases where it has been held, in regard to temporary stagings erected for the repair or completion of buildings, that, if suitable workmen and materials are provided, the obligation of the master is discharged. But, in this class of cases, the erection of stagings is a necessary part of the work to be done, and a means for its accomplishment by those who undertake it. It may often depend upon the manner in which it is proposed to conduct the work whether such erections shall be made in one form or another. When the preparation of such appliances is not entrusted to nor assumed by the workmen, the master may be guilty of negligence if defective appliances are furnished, even though the workmen themselves are employed in furnishing them. Arkerson v. Dennison, 117 Mass. 407. Where the master undertakes to perform such a duty, and his servants employed therein are negligent, he is clearly responsible. Thus, in Mulchey v. Methodist Religious Society, 125 Mass. 487, it was held that, where the defendant undertook to erect and remove a staging to be used by C. (whose servant the plaintiff was) in painting a church, and employed D. for that purpose, the plaintiff was not a fellow-servant of D. so as to prevent his recovery for an injury caused by a defect in the staging.

The defendant places much reliance on the case of Lovegrove v. London, Brighton & South Coast Railway, 16 C. B. (N. S.) 669, where the plaintiff, a laborer in the defendant's employ, was engaged in filling trucks with ballast, moving them from a pit, on rails temporarily laid to the permanent rails, and there attaching them to the engine. While so engaged, one of the temporary rails, in consequence of its being insecurely placed by the negligence of another servant, whose duty it was to superintend the laying of the rails and to change them as the work progressed, sprung up under the pressure of a loaded truck and injured him. Without citing this case for approval or otherwise, it is readily distinguishable from the one at bar. In that case, the thing to be done was to convey the ballast from the pit; as a part of that work, the shifting of the rails from time to time was necessary, and the moving of the loaded trucks and the re-arrangement of the rails were parts of one common occupation. When a track exists

as permanent as that which the evidence showed in this case to have been laid, and is intended to remain until the work is completed, it is an instrument for the use of those who conduct and manage the trains, such as they have a right to expect will be prepared with all due care, and to whose strength they may safely confide. Snow *v.* Housatonic Railroad, 8 Allen, 441.

The defendant further contends, that the construction and maintenance of the switches and turn-tables of a railroad may be delegated, even if the construction and maintenance of the line itself are within the duty of the owners of the railroad, and to be provided for by them; and thus that, as the defendant would be excused if he had employed suitable persons and provided suitable materials therefor, he should also, under similar circumstances, be excused if the spur track and the trestle-work, which are but appendages to the main line, were defectively constructed. We cannot concede the proposition, that the construction and maintenance of turn-tables and switches are not within the duty of the master equally with the main line. They are essential to its operation, and without them, or efficient substitutes for them, the road could not be used.

The defendant relies on several cases which should be considered. King *v.* Boston & Worcester Railroad, 9 Cush. 112, cannot be deemed to hold that a corporation is not responsible for want of ordinary care in preparing and providing a suitable switch. The facts of the case are somewhat meagrely reported, but the opinion states, with great distinctness, that the case shows that there was no want of due care and diligence on the part of the corporation, and on this the decision is based.

In Sammon *v.* New York & Harlem Railroad, 62 N. Y. 251, the accident proceeded from the fault of the switch-tender, who must be deemed to have been a fellow-servant with the plaintiff, who was an operative on the train.

In Potts *v.* Port Carlisle Dock & Railway, 2 L. T. (N. S.) 283, the accident was caused partly by the carelessness of a fellow-servant, and partly by the defective construction of a turn-table, and the case therefore, to a certain extent, supports the position of the defendant. On the other hand, it is said by Mr. Justice Bigelow, in Snow *v.* Housatonic Railroad, ubi supra, that "proprietors of a railroad would be responsible for accidents happening by tracks improperly laid, or switches which were not constructed to operate with regularity and precision;" and the same opinion states that the same care is required in maintaining them as is required in their construction.

In Ladd *v.* New Bedford Railroad, 119 Mass. 412, it is said by Chief-Justice Gray that the defendant corporation was "obliged to use the utmost case consistent with the nature and extent of its business in providing a proper switch."

The spur track, if intended to be less permanent than the main line, was a fixed structure, not designed to be readjusted from time to time as work progressed, but to remain and be used for an important work, which could not be finished for an indefinite period. The plaintiff, who was employed on a train which ran over the spur track, had as much right to have the corporation construct it with all due care, as the driver of a locomotive engine has to receive from the corporation an engine which is safe and suitable for transportation. All those by whom a corporation performs its work are its servants, and thus fellow-servants each with the other. But the relation in which those who together manage the train and the track for the purpose of performing transportation stand each to the other, is quite different from that which they bear to those who perform the work of its construction and repair; and they have a right to expect the suitable instrumentalities and appliances which it is the duty of the master to furnish.

It is not important to consider whether the injury occurred by the wrong construction of the trestle-work, or by the failure to tie together the rails on the spur track and trestle-work; in either case, the failure of duty was that of the defendant.

As the case was properly submitted to the jury in this view, it is not necessary to decide whether there is not also evidence that the defendant took upon himself the work of supervision of the maintenance of the structure, and thus assumed its responsibility, even if he was not obliged to do so.

Exceptions overruled.

Injury Occasioned by Negligence of Company combined with Negligence of Fellow Servant.—Where an injury is occasioned partly by a defect in the track or machinery of a railroad company and partly by the negligence of a fellow-servant, the person injured may maintain his action against the company. Paulmier v. Erie R. Co., 5 Vroom (N. J.), 151; Cayzer v. Taylor, 10 Gray, 274; Stetler v. Chicago & N. W. R. Co., 46 Wisc. 497; Grand Trunk R. Co. v. Cummings, 106 U. S. 700; s. c., 12 Am. & Eng. R. R. Cas. 204.

GILMORE

v.

NORTHERN PACIFIC RY. CO.

(Advance Case, U. S. Circuit Court, Oregon. January 4, 1884.)

The rule first suggested in Priestly v. Fowler, 3 Mee. & W. 1, that a master who has exercised due care and skill in the employment and retention of his servants is not responsible for an injury sustained by one of them in the course of his employment by the negligence of another, however distinct the

grade or different the labor of such servants, or how widely separated the locality of their several employments, is being modified by the course of judicial opinion and decision, so as to meet the ends of justice in cases since arising of corporations and others engaged in varied and widely extended operations under one nominal and invisible head, but in reality divided into separate parts or divisions, under the direction and control of local bosses, superintendents, or heads of departments, who, to all intents and purposes, represent and stand for the corporation with practically unqualified power to employ, direct, and discharge workmen, and to provide the necessary material and appliances for their convenient and safe employment.

It seems well established that a master is responsible to his servant for an injury sustained by him, without his fault, in consequence of the negligence of a fellow-servant: 1. When the latter, having authority over the former, orders him to do an act not within the scope of his employment, whereby he is exposed to a danger not contemplated in his contract of service, and he is injured in so doing. 2. Where the master has charged the latter with the duty of providing proper material and appliances for carrying on a work in which he is personally engaged with the former or not, and by the neglect to do so he is injured.

In February, 1883, the Northern Pacific Railway was engaged in constructing its road through western Montana, and had many gangs of men, numbering not less than fifty each, at work on the line of the route, at from three to five miles apart, under the control and direction of foremen or local bosses, with the power to employ and discharge, subject themselves to the control of a general superintendent and assistant, who passed along the route and inspected the camps at certain periods; some of these gangs used giant-powder for blasting the rocks and frozen earth, and in such case the foreman was charged specially with the duty of handling the powder and thawing it when frozen; the general superintendent was aware of the danger of thawing powder before a fire, and had given general notice not to do it, and provided a safe appliance, called a "heater," for the purpose, subject to the requisition of the local boss; the plaintiff was employed as a common laborer in one of these gangs where powder was always thawed without a "heater" before the fire, and while assisting in so thawing powder by direction of the local boss, was injured by its explosion. *Held*, that the local boss, so far, stood in the place of the defendant, and that the néglect of the former to obtain and use the proper appliance for thawing powder, and his directing the plaintiff to assist in thawing powder without the security of such appliance, were wrongful acts, for which the defendant is responsible to the plaintiff so far as he was injured thereby.

ACTION for injuries to the person. The opinion states the facts.
William H. Effinger and Arthur C. Emmons for the plaintiff.
Rufus Mallory for the defendant.

DEADY, J.—This action is brought by the plaintiff, a citizen of Oregon, against the defendant, a corporation formed under a law of the United States, to recover the sum of twenty-five thousand dollars damages. for serious bodily injuries, sustained by him on February 13, 1883, at Horse Plains, Missoula county, Montana, while in the employ of the defendant as a laborer in and about the construction of its railway, by reason of the negligence and unskilfulness of the defendant in attempting to thaw a quantity of giant-powder before an open fire, whereby the same was suddenly ex-

ploded; and without any negligence or fault on the part of the plaintiff.

The answer of the defendant contains a denial of all the allegations of the complaint, and a plea or defence that the injury suffered by the plaintiff "was caused and occasioned" by his own "fault, carelessness, and negligence," and that of "his co-laborers and fellow-servants;" and without the fault of the defendant. The case was tried with a jury on November 21st, and there was a verdict found for the plaintiff in the sum of four thousand five hundred dollars.

The defendant now moves for a new trial, on the grounds: 1. Insufficiency of the evidence to justify the verdict; and, 2. Error in law occurring at the trial.

On the argument of the motion, the first ground was abandoned, it being admitted that the injury to the plaintiff was the direct result of the negligence of the foreman, and the only point made in support of it is that the court erred in not instructing the jury, as requested by the defendant, that if the defendant exercised reasonable care in the employment and retention of Cortin as foreman, and provided him, or placed at his control, a safe appliance for thawing giant-powder, of the most approved kind, and one that is in general use for that purpose, the plaintiff is not entitled to recover; or in other words, that Cortin, the boss of the gang in which the plaintiff was at work, was only his fellow-servant, and therefore the defendant is not responsible for any injury sustained by the plaintiff through or by means of such foreman's fault or negligence.

On the trial it appeared from the evidence that the plaintiff is a man about forty-three years of age, accustomed to labor with a pick and shovel, and that he was in the employ of defendant as such laborer from April 7, 1882, to the date of his injury; that a great many gangs of men, numbering fifty or more each, were at this time in the employ of the defendant, in this region, engaged in the construction of its road, at points from three to five miles apart, under the direction and control of local bosses, who had the power to employ and discharge the men as they saw proper; that the whole line of work was in the charge of a general superintendent, Mr. J. L. Hallett, and assistants, who travelled along the route at intervals and inspected the condition of the gangs or camps, and the character of the work being done by them, and gave such directions to the several bosses concerning the same as were needed; that by some of these gangs giant-powder was used for blasting rock and frozen earth, and that in such case the handling of this powder, and particularly the thawing of it, was committed to the special charge of the local boss, who was supposed to have some special qualifications for the trust, and received extra compensation for the skill and risk involved therein; that it being known to the

superintendent that it was dangerous to thaw giant-powder by placing the sticks or canisters before an open fire, notice was given generally to the bosses not to do it, but to use a "dug-out" or drift in the ground, in which the powder was placed and subjected to a gradual and uniform heat from a fire at the mouth of the cave, which warmed the air within; or a device called a "heater" or "thawer"—the same being a galvanized iron kettle weighing from fifty to seventy-five pounds, with double walls—whereby the powder placed in the body of this vessel and hung over a fire—the space between the walls being filled with water—was subjected to a gradual and uniform heat, so as to prevent a partial or unequal thawing or softening of the mass, and thereby setting a portion of the nitro-glycerine in its composition free from the earthy or other non-explosive matter, wherein it was held in absorption, in which state it was very liable to explode from handling or any slight disturbance or concussion; that these "heaters" were provided by the superintendent and stored at a convenient place at the end of the road, from whence they could be obtained by a local boss whenever he desired one; but none was ever furnished to or used in the camp or gang where plaintiff was employed, and Cortin always thawed his powder before an open fire; that on the morning of February 13th, Cortin's gang were engaged in cutting a ditch about a mile from the line of the road for the purpose of taking water to the tank, when Cortin said to the plaintiff, "Jack, we have to thaw some powder," to which he answered, "Where is 'Old Billy,' the powder thawer?" when Cortin replied, "I forgot that; do you get some wood and make the fire;" and thereupon the plaintiff cut and carried wood from the vicinity and made and kept up the fire, while "Old Billy" and Cortin attended to the thawing of the powder until some time in the afternoon; and just as the plaintiff was walking away from the fire in the direction of where the rest of the gang were working on the ditch, Cortin picked up a stick of the powder, and, as he turned his face from the fire, said, "Is this anyway near thawed?" when it exploded in his hand, killing himself and "Old Billy" outright, and injuring the plaintiff severely, as by breaking his ribs, severely lacerating the muscles of his arm, breaking the drum of his ear, injuring the sight of one of his eyes, and otherwise affecting him, so that he is reduced from the condition of a strong, well man to that of an invalid, who will probably never be able to labor again, or be altogether free from physical pain and inconvenience; that a short time before the explosion Thomas Finnegan, an assistant superintendent, passed along the route, and, as he testifies, "saw the powder being thawed before the fire, and told Cortin to have it removed; that he knew it was contrary to orders, and he would discharge him in the morning," and then passed on without stop-

ping to see that the powder was removed, or taking any other measures to have it done.

The court instructed the jury, as requested by the defendant, that if the foreman, Cortin, and the plaintiff were both employed in the same gang, in a common employment or service, under the same or a common boss or superintendent, they were fellow-servants, and the defendant is not liable for the negligence of Cortin, in the course of this employment, causing injury to the plaintiff; and the fact that Cortin was foreman of the gang does not make the defendant responsible for his acts as to the plaintiff or other employees in such gang; and added:

"If Cortin was simply the foreman of the gang in which the plaintiff was employed, both working together side by side, the former merely leading in the work and giving the immediate direction to it, in the presence or near vicinity of a common boss or superintendent, then Cortin and the plaintiff were fellow-servants, and the defendant is not responsible for an injury to either caused by the negligence of the other. But if the work which this gang of men was engaged at was under the practical direction and control of Cortin, subject only to the directions received by him personally from time to time, as the local boss, from an absent or distant superintendent and the occasional and casual oversight of his travelling assistants; if Cortin had the authority to employ and discharge the men in his gang and direct and control their movements, so far as the work in his charge was concerned; and ordinarily there was no one else present and authorized to superintend or direct the work or the laborers—then he represented the company for the time being. He stood, so far as it or they are concerned, for the defendant, and his negligence is so far the negligence of the defendant; and the latter is responsible to the plaintiff therefor to the extent he was injured in consequence thereof."

Upon this statement of the law, the case was submitted to the jury, to say whether Cortin was a mere fellow-servant of the plaintiff or not, with the further instruction that if they found he was, their verdict must be for the defendant, but if not, then it should be for the plaintiff, in such such sum as they might find he was entitled to upon the evidence, under the instructions and suggestions of the court.

Beginning with Priestly *v.* Fowler, 3 Mee. & W. (England, 1837) 1; and Murray *v.* Railway Co., 1 McMull. (South Carolina, 1845) 385; and Farwell *v.* Boston Ry. Co., 4 Met. (Massachusetts, 1842) 49, the rule was established that a master or employer was not responsible for an injury sustained by his servant or employee in consequence of the negligence of a fellow-servant, as to the employment and retention of whom the former had exercised due diligence and care; but that the liability to injury by such means

was one of the risks incident to the employment, and that a "fellow-servant," within the meaning of the rule, were all persons employed or engaged in the same common service, from the highest to the lowest, and who are subject to the same general control." Wood's Master and Servant, sec. 427.

But in the progress of society, and the general substitution of ideal and invisible masters and employers for the actual and visible ones of former times, in the form of corporations engaged in varied, detached, and wide-spread operations, as in the construction and working of long lines of railway, it has been seen and felt that the universal application of the rule often resulted in hardship and injustice.

Accordingly, the tendency of the more modern authorities appears to be in the direction of such a modification and limitation of the rule as shall eventually devolve upon the employer, under these circumstances, a due and just share of the responsibility for the lives and limbs of the persons in its employ.

In the supreme court of the United States the rule has not only been materially limited but sharply questioned: Packet Co. *v.* McCue, 17 Wall. 508; Railway Co. *v.* Fort, Id. 553. And in several of the States it has been much relaxed: Louisville Ry. Co. *v.* Collins, 2 Duv. 114; Flike *v.* The B. & A. Ry. Co., 53 N. Y. 549. Lanning *v.* N. Y. C. Ry. Co., 49 Id. 521; Brickner *v.* N. Y. C. Ry. Co., 5 Lans. 506; S. C., 49 N. Y. 672; Lalor *v.* Chicago, etc., Ry. Co., 52 Ill. 401; Nashville, etc., Ry. Co. *v.* Carroll, 6 Heisk, 348; Ford *v.* Fitchburg Ry. Co., 110 Mass. 240; Cleveland Ry. Co. *v.* Keary, 3 Ohio St. 201; Mullen *v.* Steamship Co., 78 Pa. St. 26.

By reference to these and other like cases it will be seen that at least two points in qualification of this rule may be considered well established: 1. That when a servant is directed by a fellow-servant, having authority over him, to do an act beyond the scope of his employment, which exposes him to a danger not contemplated in the contract of service, and while so doing he is injured without fault of his own; or, 2. Where a servant is authorized and required by his employment to furnish or provide suitable material or appliances for the work in which his fellow-servants are engaged, whether under his special direction or otherwise, and one of them is injured by reason of his neglect or omission in this respect, the common master or employer is responsible in either case.

The evidence in this case shows that the defendant had committed to Cortin the authority to employ, direct, and discharge the men in his gang and had also conferred on him the authority and trusted him to perform the duty of procuring or ordering from its stores of material a "heater" for the purpose of thawing giant-powder in his camp whenever needed. The evidence also tends to show that it was known to the general superintendent and his

assistants that it was highly dangerous to thaw giant powder before a fire in this way, where, from the irregular application of the heat, it was liable to soften and relax unequally, and that therefore notice had been given to the local bosses generally not to attempt to thaw it in such manner.

It is not clear that this notice ever directly reached Cortin, but it is quite certain that no "heater" was ever seen or used in his camp, and that the powder used there was always thawed before a fire, as on this occasion.

The plaintiff is comparatively an unskilled man, from the humbler walks of life, and appears to have been altogether ignorant of the danger incident to thawing giant-powder in this manner. And, indeed, it is safe to say, that the occult eccentricities of this material, when frozen or being thawed, are not well understood, by even the scientific world. Am. Cyclo., Explosives.

It is not clear that Cortin had a right, under the circumstances, to order the plaintiff, a common pick and shovel laborer, to assist in thawing powder, even with the aid of an appliance like this "heater;" but to do so without it was clearly wrong, because it subjected him to a serious danger, not within the scope of his employment, and not contemplated in his contract of service. And, for the injury sustained by the plaintiff, by means of this wrongful act, by one who, according to the better rule of law, stood, so far, in the place of the defendant, the latter is liable to respond to the former in damages.

Again: The work in which Cortin was engaged involved the use of giant-powder for blasting, and as incident to this, in that climate, the operation of thawing it when frozen. The evidence of the defendant tends to show that the handling of this powder, including the thawing of the same, was generally committed, as a sort of personal trust, to the local boss, who was supposed to be selected with some reference to his qualifications therefor; and who might select some persons from the gang to assist him thereabout. In selecting persons for this purpose, as a rule, only those who were willing were thus employed. But, if any one refused, as he might, he was liable to be discharged, and probably would be. A part of the duty of the local boss, in this respect, was to provide the appliance of a "heater" wherein to thaw this powder. In this matter, also, he stood in the place of the defendant, and the latter is responsible to the plaintiff for the injury caused by his negligence therein.

If Cortin was not aware of his duty in the premises, as he may not have been, he was not qualified for the employment; and if he was aware of it, he willfully disregarded it; and being, in either case, so far the representative of the defendant, it is equally responsible for his conduct, whether attributable to willfulness or ignorance.

On the argument it was further contended by counsel for the defendant that, admitting the plaintiff's theory of the law as to the local boss being the representative of the defendant, yet while the assistant superintendent was at the camp on the day of the explosion, he superseded such boss as such representative, and that said assistant having then and there rebuked Cortin for attempting to thaw powder before the fire, and at the same time given him an order to remove it, accompanied by a threat that he would discharge him on his return the next morning, the defendant did its duty in the premises, and is not responsible for the consequences of Cortin's disobedience or neglect to obey its order made through the assistant superintendent.

Granting that the assistant was the representative for the time being of the defendant, he should not have left the camp until he saw the powder removed from the fire, and the threatened danger averted; instead of which he went his way, leaving the powder before the fire in charge of Cortin, as before he came. If he had even warned the plaintiff of the danger, it might have been sufficient, but his communication with Cortin appears to have been out of the hearing of the men, and only occupied a moment or two as he passed by.

Besides, it is not to be forgotten, that on account of the improbability of some material elements of this statement, and the manner of the witness while making it, the jury may well have doubted its correctness, and probably did.

In my judgment, the presence or conduct of the assistant did not affect the character of the transaction, so as to change or modify the right of the plaintiff or the liability of the defendant.

If he stood for the defendant while at the camp, he was as negligent then as Cortin was before and afterward, so that instead of relieving the defendant from responsibility for the plaintiff's injury, he probably enhanced it by adding the weight of his negligence to that of the local boss.

The motion for a new trial is denied.

See Lake Shore & M. S. R. Co. *v.* Lavalley, 5 Am. & Eng. R. R. Cas. 549; McCosker *v.* Long Island R. Co., 5 Am. & Eng. R. R. Cas. 564; Hall *v.* Missouri Pac. R. Co., 8 Am. & Eng. R. R. Cas. 106; Davis *v.* Central Vt. R. R. Co., 11 Am. & Eng. R. R. Cas. 173.

ATCHISON, TOPEKA AND SANTA FÉ R. R. CO.

v.

MOORE.

(*Advance Case, Kansas. Jan.* 3, 1884.)

A road-master of a railroad company, upon whom is imposed the duty of directing the repairs of the road and keeping the road in safe condition, is, in the line of his duty, the representative of the company.

Where the road-master of a railroad company, whose duty it is to direct repairs and keep the road in safe condition, is culpably negligent in the performance of his duty, the railroad company, even under the rule of the common law, is liable for the damages resulting from such negligence to one of its other servants or employees.

In an action brought by a brakeman, twenty-seven years of age and receiving wages of $60 per month, against a railroad company for damages caused by the negligence of the company, where the permanent disability is the loss of a leg below the knee and where the plaintiff after his injury had his leg sawed off three times before the surgeon got it right; then was confined to his room over fifty days, and during the time had the lock-jaw for twelve or fifteen days so severely as to be unconscious at times and suffered everything that a man could suffer and not die, and upon the first trial a verdict for $8000 was rendered and upon the second trial a verdict for $10,000. *Held*, the last verdict is not so excessive as to warrant the Supreme Court to set aside and grant a new trial solely on the ground of excessive damages.

Geo. R. Peck, A. A. Hurd and J. B. Scroggs for plaintiff in error.

Thomas P. Fenlon for defendant in error.

HORTON, C. J.—This was an action to recover damages for injuries sustained by the plaintiff, the defendant in error, near Montoya, Texas. The accident occurred on the morning of August 2, 1881. The plaintiff was a brakeman on a train which had started that morning from El Paso, Texas, to go to San Marcial, New Mexico. At the time of the accident he was on the engine, where he went to leave his lamp. When he saw the washout on the road ahead of the engine, he called to the engineer and made a jump to get off. The engine dropped down off the bridge six or eight feet, and the apron, a piece of sheet-iron to cover the space between the engine and tender, was thrown over so hard that it flew back and caught the plaintiff's leg and cut it off. The case was before this court at our January term for 1883. 11 Am. & Eng. R. R. Cas. 243. The judgment of the district court was then reversed and the cause remanded. Upon the second trial, the jury returned a verdict for the plaintiff for $10,000. Judgment was rendered thereon in his favor and the cause is before us again for

review. Upon the former hearing in this court, the judgment was reversed because the trial court failed to instruct the jury as to the liability of the railroad company under the common law which is in force in Texas.

The evidence upon the new trial was the same as that of the first trial. Therefore, it is unnecessary to recite the facts here as they are set forth at great length in the report of the case in 29 Kas., supra. In the former opinion in this case, Mr. Justice Valentine, speaking for the court, after a review of the facts, said "that the railroad company in Texas, under the rule of the common law, would be liable to any one of its servants operating its road for the negligence of any other one of its servants, whose duty it was to keep the road in good condition and who culpably failed to perform such duty or to give proper warning; for in such a case the two classes of servants would not be fellow-servants or co-employees, but the latter class would really be the representative of the master—the representative of the railroad company—and the failure of the servant would be within the line of his duty." In view of this declaration of the law, the material question upon the second trial, aside from the alleged contributory negligence of the plaintiff, was whether the road-master, one E. J. Guild, who had charge of the road from Las Cruces, New Mexico, to Montoya, Texas, was culpably negligent or not. He testified "that his duties were generally to direct repairs and keep the road in safe condition; that in case of any sudden or serious break in the road, or any apprehension of danger to trains, to see, if possible, to have the road repaired and notify the train dispatcher of the fact in the case, if he could not get them repaired; that it was his duty, also, in case of washouts, to use every possible means to prevent accidents; that in the evening of August 1, 1881, he was informed by William Allen, the conductor of a train on the railroad, which had just reached Las Cruces from El Paso, 'that it was raining; that the water was rising in some of the creeks; and that if the rain continued, it was likely to wash the road.' He then left a message with the telegraph operator at Las Cruces for the train dispatcher at San Marcial, telling him not to send any trains over that division until he could go over it in the morning with the work train; that after giving the message to the operator he did not remain in the office to see whether it was sent; that he stayed in Las Cruces that night in a house or car used as a house; that he had there, subject to his orders, an engine, a hand-car, and section men." The message was not sent and evidence was produced to show that the telegraph operator could not do so for the reason that the wires were either down or crossed. The road-master further testified "that if he had known that his message had failed to reach its destination, he could have taken an engine or hand-car and gone down

that night over the road." Upon the evidence, the jury returned the special finding that the road-master, with the information he had, did not do all that a man of ordinary prudence would have done, and further found "that he utterly failed to perform his duty, under the circumstances, in that he did not wait to know positively that his message was received by the train dispatcher." This finding being supported by some evidence, renders the railroad company, under the previous decision of this court in this case, liable. 29 Kas. 632. It was the duty of the company to see that its road was in good condition and in good repair all the time, and it was liable for injuries caused by the negligence of its road-master, whose duty it was to keep the road in good condition and repair, if he culpably failed to do so or to give proper warning. If it had not been that the instructions of the trial court, upon the first trial, were misleading, the prior judgment would have been affirmed. Upon the new trial the law was declared to the jury as directed by this court, with perhaps the single exception of the instruction relating to the conduct of the telegraph operator at Las Cruces. In view, however, of the special finding of the jury that the road-master was culpably negligent, it is not necessary to express any opinion whether the telegraph operator at Las Cruces, who the evidence tended to show was an employee of the railroad company, and the plaintiff were fellow-servants within the meaning of the rule of the common law that the servant takes the risks of dangers ordinarily attending or incident to the business in which he voluntarily engages for compensation, including the carelessness of his fellow-servants. As we cannot say from the evidence in the case that, as a matter of law, no culpable negligence for which the railroad company is liable was committed, we cannot, upon the special findings of the jury, reverse the judgment; nor can we in consideration of the special findings disturb the judgment for any direction given to the jury.

It is also claimed that the trial court should have set aside the verdict and refused judgment thereon because it is alleged that the damages were excessive. The evidence conduced to show that the plaintiff when he was hurt was 27 years of age, and receiving as brakeman $60 per month; that his leg was sawed off three times before the surgeon got it right; that he was confined to his room for over fifty days; that he had the lock-jaw for twelve or fifteen days so severely as to be unconscious a part of the time; and that "he suffered everything that a man could suffer and not die." Upon the first trial, the verdict for the plaintiff was $8000; upon the second trial this was increased to $10,000. On consideration of all the circumstances, we cannot "say that the damages were so excessive as to strike the mind at first blush as being the result of bias or prejudice." Therefore, we cannot, as a reviewing court,

set aside and grant a new trial solely on the ground that the damages were excessive.

The judgment of the district court will be affirmed.

All the justices concurring.

Road-Masters.—Persons who are road-masters or who occupy analogous positions are regarded as vice-principals, and a railroad company will be held liable for an injury to other servants occasioned by their negligence. Flike *v.* Boston, etc., R. Co., 53 N. Y. 549; Booth *v.* Same, 73 N. Y. 38; McCosker *v.* Long Island R. Co., 21 Hun, 500; Stevenson *v.* Jewett, 16 Hun, 210; Deppe *v.* Chicago, R. I. & P. R. Co., 36 Iowa, 52; s. c., 38 Iowa, 592; Cook *v.* Hannibal & St. J. R. Co., 63 Mo. 397; Lewis *v.* St. Louis & Iron Mt. R. Co., 59 Mo. 495; Kansas Pac. R. Co. *v.* Little, 19 Kans. 267; Louisville & N. R. Co. *v.* Bowler, 9 Heisk, 866; Tyson *v.* South. & N. A. R. Co., 61 Ala. 554; Hall *v.* Missouri Pac. R. Co., 8 Am. & Eng. R. R. Cas. 106; Davis *v.* Central Vt. R. Co., 11 Am. & Eng. R. R. Cas. 173. But see Hodgkins *v.* Eastern R. Co., 119 Mass. 419; Ross *v.* Boston & Albany R. Co., 58 N. Y. 217; Besel *v.* New York Central & H. R. R. Co., 70 N. Y. 171; Mobile & M. R. Co. *v.* Smith, 59 Ala. 245; Hamilton *v.* Iron Mt. Co., 4 Mo. App. 464.

Nashville, Chattanooga and St. Louis R. R. Co.

v.

Wheless.

(10 *Tennessee Reports*, 74.)

The master is liable for injuries sustained by one servant through the negligence of another, who is his immediate superior.

The engineer is not the superior, but the fellow-servant, of the brakeman in their relations as members of the crew of a railroad train.

The relation of superior and inferior would exist between them where the brakeman is in fact acting under the orders of the engineer.

Appeal in error from the Circuit Court of Davidson county. N. Baxter, J.

East & Fogg for Railroad.

Bate & Williams for Wheless.

McFarland, J.—Wheless while employed as brakeman for the railroad company, was attempting to "couple" the cars of a freight train on which he was engaged, and in doing so his hand was caught, causing the loss of one of his fingers, and the permanent injury of another. For this injury he has recovered in this action $1250 damages. From this judgment the railroad company has appealed in error.

The circuit judge said correctly to the jury that the plaintiff placed his right of recovery upon two grounds: First, that the company was liable for the injury because of its failure to provide

the safer and more improved mode of coupling the cars. Second, that in backing the cars to effect the coupling, the engineer carelessly and negligently backed the train too fast. The declaration, it is true, contains other allegations of negligence, but the questions made by the proof were as stated by the circuit judge.

Upon the first question the proof showed that there were two kinds of "draw-heads" in use, by means of which freight cars were "coupled;" one known as the "open draw-head," the other the "solid draw-head." The former was the older, the latter the new invention. The latter was the improved and safer device for connecting the cars. The two cars being coupled had the "open draw-head," but the proof tended to show that the plaintiff knew that both kinds were in use, and continued in his occupation without objection. The judge charged the jury in substance, that if the plaintiff knew that both styles of "draw-heads" were in use—the difference being easily apparent to an ordinary observer—and continued to act as brakeman without objection, he could not recover.

This was in accordance with the holding of this court in the case of Hodges *v.* East Tenn., Va. & Ga., R. R. Co., and other cases, and was as full and distinct in favor of the defendant as could have been desired; and from the proof in the record it is not probable that the recovery was upon this ground.

Upon the other ground the proof showed that the accident occurred in the night in the attempt to couple two portions of a freight train that had broken apart. The conductor directed that the train be "coupled up," but did not remain to superintend it himself, going at the time into the depot to attend to other business. The proof tends to show that the engineer backed the part of the train attached to the engine to within eighteen or twenty-four inches of the car to which the coupling was to be made, and then came to a stop. The plaintiff was, at the time, standing between the cars ready to make the coupling. The engineer could not see the position of the cars or their distance apart. He was, however, signalled by another brakeman to back further, and the brakeman says he gave him the proper signal, indicating that he was to back slowly and but a short distance; but by applying too much steam the train ran suddenly and rapidly back, and the plaintiff's fingers were caught between the "bumpers." If the train had been backed slowly the accident would not have occurred. In brief, there is ample evidence to justify the jury in finding that the injury resulted from the want of care, or negligence of the engineer; so the real question in the case was whether the company was liable for the negligence of the engineer. This, under the course of decisions in this State, depends upon the question whether the engineer was the "superior" of the plaintiff in such a sense as that the latter was acting under the authority of the former and under his orders in the particular service, or were they "fellow-

servants" engaged in a common employment. The general rule of the common law is that a master is not responsible to the servant for injuries resulting from the negligence of a fellow-servant engaged in a common employment, where there has been due care in the selection and employment of the fellow-servant. The more recent decisions of this court have made exceptions to this rule in two respects: First, where the two servants are engaged in different departments of service—as for instance the engineer or hands upon a passenger train, and a section hand at work on the track: Carroll *v.* Railroad, 6 Heis. 347. This exception does not apply in the present case, for it can hardly be said that the different employees constituting "the crew" of a train, are not engaged in the same department of service. They are no doubt "fellow-servants." But the other exception is, where one servant is the immediate superior of the other, with authority to order and direct the latter in his duties—as for instance "a squad" of hands engaged in repairing the track under the authority of a "section boss."

In such case it has been held that if one of the hands is injured by the negligence of the "section boss," the company is liable: R. R. Co. *v.* Bowler, 9 Heis. 866. Hence, as we have said, the question in this case was, whether the plaintiff, as brakeman, and the engineer occupied towards each other the relation of "inferiors" and "superiors" in the sense indicated. The practical application of this rule involves some difficulty. It is, no doubt, in the first instance, a question of fact for the jury, and we take it to have been the purpose of the judge to instruct the jury that the result of the case, in this aspect, should depend upon their determination of this question of fact. While he does, in terms, submit to the jury the question whether the engineer was or was not the superior of the plaintiff, yet the charge as a whole, on this question, is somewhat ambiguous.

The charge is of that character, that the court might, if it applied to a doubtful question of fact, reverse because of its ambiguity, and tendency to mislead. The more important question, however, is whether the facts do or do not sustain the conclusion that the engineer was the superior of the plaintiff, in the sense we are considering.

There is really little or no conflict as to the facts. The witnesses differ in their conclusions or opinions upon the question, but these statements of facts are substantially the same. The engineer is required to have superior capacity and skill in his art, to acquire which requires long service. He receives higher wages than the brakeman, and in fact higher wages than the conductor or any employee on the train. He has charge of the engine and manages and operates it, and while in motion his position is on the engine. The brakemen are not required to be men of skill, but a common laborer may, with a little practice, become a brakeman. They are

distributed along the train and it is their duty to operate the brakes, usually acting upon signals given by the engineer. They also give or communicate signals to the engineer as to moving or stopping the trains. They put off and take on freight and wood, and perform other menial services. They receive the lowest rate of wages, and in a general sense, are regarded as inferior to the engineer. The conductor has charge of the train and it moves in accordance with his orders, but in many movements the engineer and brakemen act in accordance with general regulations and a general knowledge of their duties, and without any special orders. The conductor and engineer are both said to be in charge of the train and responsible for its movements. The conductor, engineer, fireman and brakemen constitute the entire crew of a freight train. In coupling cars or making up trains the engineer acts upon signals communicated him either by the conductor or brakemen; but generally he gives no orders in regard thereto. These are substantially the facts as deposed to by the witnesses. Now, the question is, whether or not upon the facts stated, the engineer was the superior in such a sense, as under our rule, to make the company responsible for the results of his negligence, to the brakeman, when engaged in the character of service disclosed in this case.

The principle upon which our rule is based, to wit: That the master will be liable for injuries resulting to one servant from the negligence of another servant who is the immediate superior of the first, is based not upon the idea of the relative rank of the two servants, or the general superiority of the one in position, intelligence or skill, or in the wages received; but upon the ground that the one is placed under the orders and directions of the other, and required to submit to and obey such orders in the performance of his duties; that the "inferior" is placed in the position of a servant to the "superior." In such cases the superior is held to represent the master.

In this view we are of opinion, that the facts do not show that the engineer was, in the sense we are considering, the superior of the plaintiff in this instance. They were engaged in a common service, each performing his particular part. They may both be said to have been acting under the orders, either express or implied, of the conductor. But the engineer did not assume any supervision of the work or give any orders in regard to it, and the plaintiff cannot, in any fair sense, be said to have been acting in this particular matter under the orders, either express or implied, of the engineer; and the mere fact that the engineer was the superior of the plaintiff in position, skill, intelligence and pay, does not change the result.

The overwhelming weight of authority will be found to support this conclusion. We have had occasion, recently, to examine these authorities in the case of the Knoxville Iron Co. v. Dobson, not

yet reported. Even the exceptions to the general rule, in regard to fellow-servants, which we have established as above indicated, is opposed to the larger number of cases. We are satisfied, however, with our own rulings, and adhere to them; but we do not feel authorized to extend the exceptions to include the present case. To do so would be in effect to abrogate the general common law rule altogether, a rule which has been long established and with the exceptions indicated, universally adhered to.

Where there has been no want of care upon the part of the master in selecting and employing a servant, or in failing to discharge him after he is known to be incompetent, a fellow-servant in a common employment and in the same department of service, not acting under the orders or in subjection to the first, has no remedy for injuries resulting from his negligence. If this be a hard rule to apply to these unfortunate men who, perhaps, for inadequate wages, perform so much arduous and perilous labor, and so many of whom are injured, it is still a rule too well established to be overthrown by the courts. If they should have other protection by law, the law-making power must provide the remedy. It is well settled, that in engaging in this employment, they take upon themselves all the ordinary risks attending it. One of these risks is that "fellow-servants," although in general careful and skilful, will sometimes be negligent. And in order to recover the plaintiff must show that his injury resulted from the carelessness or want of skill of some one who, in the particular matter, stands in the place of the master.

Of course in some cases, a railroad company may be held liable to a brakeman for the negligence of an engineer, as where the former is in fact acting under the orders of the latter. We do not mean to hold that the relation of superior or inferior, may not, in in some cases, exist between them—only that it did not in this case as far as the record shows.

Reverse the judgment.

Brakeman and Engineer are Fellow-Servants.—It is well settled that the brakeman and engineer of a train are fellow-servants and that therefore the railroad company is not liable for an injury to one of these parties occasioned by the negligence of the other. Pittsburgh, Ft. Wayne & C. R. Co. *v.* Lewis, 33 Ohio St. 396; Illinois Central R. Co. *v.* Keen, 72 Ill. 512; Sherman *v.* Rochester & S. R. Co., 17 N. Y. 153; Wright *v.* New York Central R. Co., 25 N. Y. 562; Moran *v.* New York Central & H. R. R. Co., 67 Barb. 96; Mobile & M. R. Co. *v.* Smith, 59 Ala. 245; St. Louis, etc., R. Co. *v.* Britz, 72 Ill. 256; Summerhays *v.* Kansas Pac. R. Co., 2 Col. 484; Nashville, C. & St. L. R. Co. *v.* Wheeler, 4 Am. & Eng. R. R. Cas. 633; Pittsburgh, etc., R. Co. *v.* Ranney, 5 Am. & Eng. R. R. Cas. 533; Ransier *v.* Minn. & St. L. R. R. Co., 11 Am. & Eng. R. R. Cas. 647.

CHICAGO AND ALTON R. CO.

v.

MAY.

(Abstract Case, Illinois. January 22, 1884.)

One servant of a corporation, to whom is delegated the power of hiring and discharging other servants, and in whom the corporation vests the sole control and direction of such other servants in and about the work which they may be ordinarily required to do, is, as to such servants whom he so hires, discharges and controls, the representative of the master when exercising such power or control, and is not a fellow-servant, nor is he in the same line of employment as the servants he so controls.

The mere fact that one of a number of servants who are in the habit of working together in the same line of employment for a common master, has power to control and direct the actions of the others with respect to such employment, will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to other circumstances. Each case must depend upon its own circumstances.

If the negligence complained of consists of some act done or omitted by the servant having such authority, which relates to his duty as a co-laborer with those under his control, and which might as readily happen with one of them having no such authority, the common master will not be liable.

But where the negligent act arises out of and is the direct result of the exercise of the authority conferred upon him by the master over his co-laborers, the master will be liable. In such case the governing servant is not the fellow-servant of those under his charge with respect to the exercise of such powers.

APPEAL from the Appellate Court for the Third District.

Williams, Burr & Capen for appellant.

Fifer & Phillips and W. E. Hughes for appellees.

MULKEY, J.—This action was brought in the McLean Circuit Court by Caroline May, the appellee, as administratrix of her late husband, Christian May, against the Chicago and Alton R. R. Co. for negligently and wrongfully causing his death. There was a trial upon the merits in the circuit court, resulting in a judgment for the plaintiff for $3250, which, on appeal to the Appellate Court for the Third District, was affirmed, and the company brings the case here for review.

In the view of the legal questions presented by the record and discussed by counsel, we deem it proper to state the circumstances immediately connected with the death of the deceased with some particularity. They are in substance as follows: The deceased, at the time of his death, was one of a number of hands in the employment of the railroad company in a lumber yard connected with

its work shops, at Bloomington, under the immediate control and charge of one Frederick Fricke, who was also in the employment of the company, as foreman of the lumber yard. Immediately before the death of May, we find Fricke, together with a squad of these hands, including the deceased, engaged in removing a lot of lumber from the yard to the car shops. The lumber in question consisted of a pile of heavy oak plank, some sixteen feet long. For the purpose of removal it had already been placed upon a small, light car, some six or eight feet long, called a "rubble car," which was used in handling lumber in the yard and in removing it to the shops. The lumber, as well as the car, was at the time sheeted with ice and snow. The car thus loaded stood on the track north of the shops, and immediately south of it, on the same track, stood a large box car which had to be got out of the way before the lumber could be run down into the shops. To get this car out of the way it was necessary that both cars should be pushed some distance north, beyond a switch, so the box car could be switched off to one side and by that means let the rubble car, so loaded, pass back south into the shops. To accomplish this object Fricke ordered the men to push the box car against the rubble car, which shoved the lumber so far over on the north end of it that the small car, thus loaded, would have tipped up and thrown the lumber out, but for the fact the bumper of the box car held it down. The two cars were pushed in this manner till they passed the switch, when Fricke ordered the men to leave the small car where it was, and push the large one south, out of the way. Two of the men, Grenz and Schmekel, went to the north end of the planks, as they lay projected on the rubble car, and held them up, while the other hands commenced pushing the large car, as directed by Fricke, and as soon as the cars were sufficiently separated, some of the men, including May, went in between the two cars, to enable them to push with more effect. While matters were in this situation, Fricke called Grenz and Schmekel to also come and help push the large car, whereupon they told him the plank would fall and some one would get hurt. Notwithstanding this admonition and warning, Fricke repeated his order with emphasis, saying, "Let the lumber go to the devil." The order was obeyed, and instantly the north end of the lumber fell to the ground, tilting up the south end of the little car and driving it forward with great force against the end of the car being thus shoved. The action of the car was so instantaneous the parties pushing at the end of the box car had no time to escape, and the deceased was caught between the bumper of the large car and the rubble car, thereby inflicting injuries from which he subsequently died.

The instruction claimed to be most objectionable, and the only one specially noticed in appellant's brief in this court, is as follows:

"2. That one servant of a corporation to whom the corporation delegates the power of hiring and of discharging other servants, and in whom the corporation vests the sole control and direction of such other servants in and about the work which they may be ordinarily required to do, is, as to such servants whom he so hires, discharges and controls, the representative of the master, and is not a fellow-servant, and is not, under such state of facts, if proven by the evidence, in the same line of employment as the servants whom he so controls."

The consideration of this instruction will necessarily lead us to inquire when the master will, and when he will not, be held liable for the negligence of one servant resulting in injury to another, and also to determine, as near as may be, the controlling principle governing cases of this character.

Counsel for appellant, after referring to that part of the opinion in the Moranda case, 93 Ill. 302, wherein is discussed the reasons which led to the adoption of the rule which exempts the common master from liability on account of an injury caused by the negligence of a fellow-servant in the same line of employment, proceed to say of this instruction: "It would hardly seem necessary to argue that this instruction places the question of who are fellow-servants on an entirely different basis,—that is, although, as in this case, they were in the strictest sense consociates, yet if one had the right to employ and discharge the other, and direct the work, they are not fellow-servants. This may all be true, and yet public policy requires one to watch the other, and notify the superior of incapacity or carelessness in a dangerous employment, as much as if they were all employed and directed by a common superior." It is to be remarked, in the first place, the office or object of the instruction was not to state to the jury the reasons upon which the rule in question is founded, but rather to state a hypothetical case in which the rule itself would not be applied, and if this fact is kept in view, we see no ground for misapprehension, nor do we see any real, or even apparent, conflict between it and what is said in the Moranda case. The instruction does not, either in terms or by implication, tell the jury that a servant who has power to hire and discharge other servants with whom he is in the habit of working or rendering service to a common master, can not, by reason thereof, be a fellow-servant within the meaning of the rule which exempts the master from liability. But admitting the instruction, when considered alone, is ambiguous in this respect, the jury could not possibly have been misled by it, for the court distinctly laid down the very reverse of this proposition in the following instructions given for the defendant:

"3. The court instructs the jury, for the defendant, that the common employer is not liable for any injury that may accrue to one of a set of fellow-servants of that common employer engaged

in the same line of employment by reason of the negligence of a fellow-servant in the same line of employment, and the fact that the fellow-servants are employed by different agents of the common employer, or that one has general supervision of the work of the whole, and a right to direct its execution, does not prevent them from being fellow-servants of the common employer in the same line of employment."

"7. The court instructs the jury, for the defendant, that the mere fact that of a gang of workmen one is the foreman, does not prevent their all being servants in the same line of employment, or render the employer liable for an injury resulting from the negligence of such superintendent or superior."

The instruction complained of, when fairly construed, in effect tells the jury that a servant having the exclusive control over other servants under a common master, including the power of hiring and discharging, is, in the exercise of these powers, the representative of the master, and not a mere fellow-servant, and this, we understand, is the true rule on the subject. It is true the instruction does not state this in so many words, but when construed in the light of the facts and the two instructions above mentioned given for the defendant, what we have stated is the fair import of it. More or less is to be inferred in all writings, and instructions are no exceptions to the rule. Any attempt to say, in express terms, every possible conclusion or inference intended to be drawn from a writing, could not, in the nature of things, be done, for the attempted explanations would also have to be explained, and so on indefinitely. Moreover, such a course, instead of leading to perspicuity and certainty, would most generally result in confusion and doubt. Now, if after the word "master," in the fourth line from the bottom of the instruction, the words, "when exercising such power or control," were inserted, it would relieve the instruction from all ambiguity whatever, and it would be entirely unobjectionable, even if standing alone. But we think the omitted words are fairly implied, and hence there is no substantial objection to the instruction.

The true rule on the subject, as we understand it, is this: The mere fact that one of a number of servants who are in the habit of working together in the same line of employment, for a common master, has power to control and direct the actions of the others with respect to such employment will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to other circumstances. On the other hand, the mere fact that the servant exercising such authority, sometimes, or generally, labors with the others as a common hand, will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over the others. Every case, in this respect, must depend upon its own cir-

cumstances. If the negligence complained of consists of some act done or omitted by one having such authority, which relates to his duties as a co-laborer with those under his control, and which might just as readily have happened with one of them having no such authority, the common master will not be liable. For instance, if the section boss of a railroad company, while working with his squad of men on the company's road, should negligently strike or otherwise injure one of them, causing his death, the company would not be liable; but when the negligent act complained of arises out of and is the direct result of the exercise of the authority conferred upon him by the master over his co-laborers, the master will be liable. In such case he is not the fellow-servant of those under his charge, with respect to the exercise of such power, for no one but himself, in the case supposed, is clothed with authority to command the others.

When a railway company confers authority upon one of its employees to take charge and control of a gang of men in carrying on some particular branch of its business, such employee, in governing and directing the movements of the men under his charge with respect to that branch of its business, is the direct representative of the company itself, and all commands given by him within the scope of his authority are, in law, the commands of the company, and the fact that he may have an immediate superior standing between him and the company makes no difference in this respect. In exercising this power he does not stand upon the same plane with those under his control. His position is one of superiority. When he gives an order within the scope of his authority, if not manifestly unreasonable, those under his charge are bound to obey, at the peril of losing their situations, and such commands are, in contemplation of law, the commands of the company, and hence it is held responsible for the consequences. These views are in strict accord with all that is said in the Moranda Case, to which such frequent references have been made. It is believed, moreover, that the test here suggested, and recognized in many of the cases, will reconcile many of the apparently conflicting decisions of the courts of this country which have declined to follow the English rule on this subject, and the principle, though not formally announced heretofore, is the logical result of our own adjudications.

Testing the present case by the rule here announced, the company is clearly liable, for it is manifest that May's death was the direct result of an improper and inconsiderate order that no one exercising ordinary skill or prudence would have given. It was not a mere careless act done by him in performing his work as a co-laborer or fellow-servant, but it was a negligent and unskilful exercise of his power and authority over the men in his charge, for which, as we have already seen, the company must be held to an-

swer. In support of the general views here expressed we cite the following authorities: Buckner *v.* New York Central R. Co., 2 Lansing, 506 (49 N. Y. 672); Chicago, etc., R. Co. *v.* McLallen, 84 Ill. 116; Lalor *v.* Chicago, etc., R. Co., 52 id. 401; Mullen *v.* P. & S. M. Steamship Co., 78 Pa. St. 25; Gormley *v.* Vulcan Iron Works, 61 Mo. 492.

The judgment of the Appellate Court, we think, for the reasons stated, is right, and it is therefore affirmed.

Judgment affirmed.

Foreman is Vice-Principal.—A person acting in the capacity of foreman or yard master, is generally considered as a vice-principal and the company is accordingly liable for injuries occasioned to a servant under him by reason of his negligence. Flike *v.* Boston & A. R. Co., 53 N. Y. 549: Booth *v.* Boston & A. R. Co., 73 N. Y. 38; McCosker *v.* L. I. R. Co., 5 Am. & Eng. R. R. Cas. 564; Stevenson *v.* Jewett, 16 Hun. 210; Brabbitts *v.* C. & N. W. R. Co., 38 Wisc. 289; Tyson *v.* South & N. A. R. Co., 61 Ala, 554; Dibbin *v.* Richmond & D. R. Co., 81 N. C. 446; Stoddard *v.* St. Louis, etc., R. Co., 65 Mo. 514; Lake Shore, etc., R. Co. *v.* Lavalley, 5 Am. & Eng. R. R. Cas. 549; Hall *v.* Missouri Pac. R. Co., 8 Am. & Eng. R. R. Cas. 106; H. & T. C. R. R. Co. *v.* Marcelles, 12 Am. & Eng. R. R. Cas. 231; Hannibal & St. Joe R. R. Co. *v.* Fox, and note, infra. But see Rose *v.* Boston & A. R. Co., 58 N. Y. 217; Besel *v.* New York C. & H. R. R. Co., 70 N. Y. 171; Hofnagle *v.* N. Y. C. & H. R. R. Co., 55 N. Y. 608; Wager *v.* Penna. R. R. Co., 55 Pa. St. 460; Hodgkins *v.* Eastern R. Co., 119 Mass. 419; Zeigler *v.* Day, 123 Mass. 152.

Test as to who is Vice-Principal.—Whether or not the officer in question has the power to employ and discharge servants is often considered as the most important point in determining whether or not he is to be deemed a vice-principal. Kansas Pac. R. Co. *v.* Little, 19 Kans. 267; Chapman *v.* Erie R. Co., 55 N. Y. 579; Malone *v.* Hathaway, 64 N. Y. 5; Brothers *v.* Cartter, 52 Mo. 372; Stoddard *v.* St. Louis, etc., R. Co., 65 Mo. 514; Walker *v.* Bolling, 22 Ala. 294; Huntingdon & Broad Top R. & C. Co. *v.* Decker, 82 Pa. St. 119; s. c., 84 Pa. St. 419; Cumberland & P. R. Co. *v.* State, 44 Md. 283; Kansas Pacific R. R. Co. *v.* Salmon, 11 Kans. 83; Cook *v.* Hannibal & St. Joe R. Co., 63 Mo. 397.

Hannibal and St. Joseph R. R. Co.

v.

Fox.

(*Advance Case, Kansas. March* 6, 1884.)

At common law, the master assumes the duty towards the servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work; and where the service required of an employee is of a peculiarly dangerous character. it is the duty of the master to make reasonable provision to protect him from the dangers to which he is exposed while engaged in the discharge of his duty.

At common law, whenever the master delegates to any officer, servant,

agent, or employee, high or low, the performance of any duty which really devolves upon the master himself, then such officer, servant, agent, or employee stands in the place of the master and becomes a substitute for the master and the master is liable for his acts or his negligence.

A foreman or boss car repairer of a railroad company was put in charge of three subordinate car repairers, whose duty it was to repair cars while standing on the track in the yard of the company in which trains were to be made up, at St. Joseph, Mo. The company left everything concerning the work of repairing the cars, the control of the subordinate employees, and their protection while engaged in their work, to such foreman or boss repairer; the foreman directed a car to be set on the track at a particular place for the purpose of being repaired; he then ordered two of his subordinates to go under the car for the purpose of repairing it; these employees took with them the tools necessary to make the repairs and while they were engaged in repairing the car, other cars pushed this car along upon the track in such a manner as to cause the car to break and mangle the arm of plaintiff, one of the subordinate employees; plaintiff had nothing to do with the movement of the cars pushed against the car under which he was working; he did not know and could not have known in the situation he was in, that cars were being pushed against the car under which he was at work until they struck the car; no notice or warning from the foreman or by signal-bell or otherwise was given him of the approach of the car; it was not in his power to prevent the collision of the cars or to save himself, by the exercise of reasonable care, from injury; at the time the foreman was present overseeing the work and it was his duty to notify the yard master having control of the management of the cars when and where he was going to repair a car; no signal-flags were furnished by the company or used by the foreman to designate the car that was being repaired; *held*, that it was the duty of the foreman or boss car repairer as the representative of the company to see that reasonable precautions were taken to protect and guard his subordinates while engaged in the discharge of their duties under the car where he had placed them against danger arising from the switching of cars and the making up of trains on the same track, and for an injury resulting from his negligence in this respect, the company is liable.

ERROR from Atchison County.

Geo. W. Easley and B. F. Stringfellow for plaintiff in error.

Thos. P. Fenlon and John C. Tomlinson for defendant in error.

HORTON, C. J.—This was an action to recover damages on account of certain personal injuries received by Fox, plaintiff below, while engaged in the service of the railroad company, by the alleged negligence of the company and its employees. The evidence in behalf of Fox tended to show that on March 3, 1883, Robert Lovell was the foreman or boss car repairer in the yards of the railroad company at St. Joseph, Mo. That Harris Harrington was the yard master of the company, and had control of the movement of cars at the same place; that Lovell had under his orders two day repairers and one night repairer; that Fox was one of the day repairers; that Fox and Edward Powers were ordered by Lovell to go under a car in the yards of the company in the said city of St. Joseph, for the purpose of repairing the car; that they took with them the tools necessary to make the repairs; that while

they were working under the car, other cars pushed this car along upon the track in such a manner as to cause the car to break and mangle the arm of Fox; that Fox had nothing to do with the movement of the cars pushed against the car under which he was working; that he did not know and could not have known in the situation he was working that cars were being pushed against the car under which he was, until they struck the car; that no notice or warning from Lovell, by signal-bell, or otherwise, was given to him of the approach of the cars; that it was not in his power to prevent the collision of the cars; that at the time, Robert Lovell, the foreman, was present, overseeing the work; that by the order of Lovell the car which was pushed over plaintiff's arm was set on the track at the place where it was being repaired; that four or five days after the injury, Lovell was discharged from the employ of the company; that the latter had frequently applied to the company for flags to designate cars that were to be repaired, but up to this time they had not been furnished; that at this time the only means that Harrington, the yard master, had of knowing the car repairers were at work upon a car, was by the foreman or boss repairer telling him when and where he was going to repair a car; that after the injury to Fox, signal flags were used to designate the cars that were being repaired.

It is claimed for the railroad company that the petition failed to state any cause of action; that the trial court erred in overruling the demurrer to the evidence of Fox; that the court erred in refusing to direct the jury to find for the railroad company; that the court erred in the instructions given and excepted to; and finally, that the court erred in refusing to enter judgment for the company upon the special findings of fact returned by the jury.

The principal question in this case is, whether the railroad company was guilty of negligence towards Fox. The injury complained of occurred in the State of Missouri, and it is conceded that the common law as to the liability of master for injuries to servants is in force in that State.

The contention of the railroad company is that the petition attempted to state a right of action based on an injury caused by the negligence of a fellow-servant; that all the acts of negligence charged or proved were purely and simply acts of negligence of a fellow-servant, for which under the common law the railroad company was not liable. In support of this it is further contended that the foreman or boss car repairer was a fellow-servant with the subordinate employees under his control. We do not concur in this view. In Railroad Co. *v.* Salmon, 14 Kas. 512, in speaking of the officers, agents and servants of a railroad company empowered to furnish proper implements, machinery and materials for the employees to operate with in accomplishing their work, it was said that "these higher officers, agents or servants can-

not, with any degree of propriety, be termed fellow-servants with the other employees who do not possess any such extensive powers and who have no choice, but to obey such superior officers, agents or servants. Such higher officers, agents or servants must be deemed in all cases, when they act within the scope of their authority, to act for their principal, in the place of the principal, and in fact to be the principal. We also think that it is the duty of a railroad company, with reference to both passengers and employees, to exercise reasonable care and diligence in making sufficient regulations for the safe running of trains so as to avoid injury from collision or from any other source. . . . If an employee performs the duties of one of the higher officers, agents or servants, of which we have already spoken, the company is generally responsible for his negligence, whatever may be his grade."

One of the exceptions to the general rule of the common law, that the master is not liable to one employee for the negligence of a co-employee in the same service, arises from the obligation of the master, whether a natural person or corporate body, not to expose the servant when conducting the master's business to perils or hazards against which he may be guarded by proper diligence upon the part of the master. If it were otherwise, the master would be released from all obligation to make reparations to an employee in a subordinate position for any injury caused by the wrongful conduct of the persons placed over him, whether they were fellow-servants in the same common service or not.

In Railroad Co. *v.* Holt, 29 Kas. 149, it was said: "The rule is, even under the common law, that the master employing servants upon any work, particularly a dangerous work, must use due and reasonable diligence that he does not induce them to work under the notion that they are working with proper and safe machinery, while employing defective and dangerous machinery; and if an empleyee is injured on that account and without fault of his own, the master is liable in damages."

In Railroad Co. *v.* Moore, 29 Kas. 632, it was said: "In all cases at common law, a master assumes the duty towards a servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work. . . . And at common law, whenever the master delegates to any officer, servant, agent or employee, high or low, the performance of any duty which really devolves upon the master himself, then such officer, servant, agent or employee, stands in the place of the master and becomes a substitute for the master—a vice-principal—and the master is liable for his acts or his negligence."

In the late case of Railroad Co. *v.* Moore, 31 Kas., it was decided "that at common law, a railroad company is liable to a brakeman for injuries caused by the negligence of the road master or foreman, whose duty it was, over a portion of the road, to direct

repairs and keep it in safe condition." These authorities, and many others which might be cited, established, we think, that it was the duty of the railroad company to make such provisions and regulations for the safety of the subordinate employees under the control and direction of Lovell as would afford them reasonable protection from the dangers incident to the performance of their respective duties. It was the duty, therefore, of the company to protect them from the dangers to which they were exposed from moving trains while engaged in the work of repairing cars. Without such protection they were, while at work, constantly in imminent danger. If the company had furnished flags to designate the cars that were being repaired and these had been placed in the centre of the rails near the car under which Fox was working, they would undoubtedly have prevented the injury complained of, but the company furnished no flags. It left everything concerning the work of repairing the cars, the control of the subordinate employees and their protection while engaged in their work, to Lovell. He was not only the foreman to direct the work of his subordinates, but he was the person, above all others, to provide that they had a reasonably safe place at which to work; and while he was present, overseeing their work, upon him devolved the duty of using ordinary care and diligence to prevent them from being injured, mangled or crushed by other trains or cars moving the one under which he had placed them. It is immaterial, therefore, whether Lovell be called superintendent, middleman, boss repairer, or foreman. The duty devolved upon him to direct his subordinates to work in a peculiarly dangerous place, where by the exercise of reasonable care they could not protect themselves from approaching trains or cars; and under such circumstances the duty devolved upon him as the representative of the company, to protect his subordinates while at work from the switching of cars and the making up of trains on the same track. He failed to perform his duty. For his negligence in this respect the company is liable. The latter cannot in this matter interpose between it and Fox, who has been injured without fault on his part, the personal responsibility of Lovell who, exercising the company's authority has violated the duty he owed, as well to Fox as the company. Hough *v.* Railway Co., 100 U. S. 213, and cases there cited; Railway Co. *v.* Lavalley, 36 O. St. 221.

All the exceptions taken must be overruled. If the allegations in the petition were in any manner indefinite or uncertain, as alleged by counsel, application should have made to compel the plaintiff below to make the petition definite and certain by amendment. Sec. 119 of the Code; Insurance Co. *v.* Duffy, 2 Kas. 347; Meagher *v.* Morgan, 3 Kas. 372; Smith *v.* Burnes, 8 Kas. 197; Railroad Co. *v.* Comm'rs of Douglas Co., 18 Kas. 169.

Under the circumstances, we do not regard the damages as

excessive. Railway Co. v. Young, 19 Kas. 488; Railroad Co. v. Moore, 31 Kas.

With the conclusions we have reached, it is unnecessary to comment upon the other questions presented; we are convinced that there is no error appearing upon the record to justify a reversal of the judgment. Therefore the judgment of the district court must be affirmed.

Foreman and Servant under him making Repairs are not Fellow-Servants.—A foreman or boss having charge of repairs either of the road-bed or machinery of the company is generally held to be a vice-principal, and for an injury to a person under him resulting from his negligence, the railroad company is liable. Brabbitts v. Chicago & N. W. R. Co., 38 Wisc. 289; Lewis v. St. Louis & I. Mt. R. Co., 59 Mo. 495; Cook v. Hannibal & St. Joe R. R. Co., 63 Mo. 397; Louisville & Nashville R. Co. v. Bowber, 9 Heisk. 866; Stevenson v. Jewitt, 16 Hun. 210; Deppe v. Chicago, R. I. & P. R. Co., 38 Iowa, 592; Lake Shore, etc., R. Co. v. Lavalley, 5 Am. & Eng. R. R. Cas. 549. See Houston & T. C. R. Co. v. Marcelles, 12 Am. & Eng. R. R. Cas. 231. But see Mobile & M. R. Co. v. Smith, 59 Ala. 245; Weger v. Penna. R. R. Co., 55 Pa. St. 460; Hofnagle v. N. Y. Central & H. R. R. Co., 55 N. Y. 608; Barringer v. Delaware & Hudson Canal Co., 19 Hun. 216; Hamilton v. Iron Mt. Co., 4 Mo. App. 564. See Chicago & Alton R. R. Co. v. May, and note, supra.

Atchison, Topeka and Santa Fé R. R. Co.

v.

King

(*Advance Case, Kansas. April* 7, 1884.)

The words, "an action for injury to the rights of another, not arising on contract," in subdivision 3, of section 18 of the Code of Civil Procedure, limit and qualify the provision in subdivision 2, of said section 18, giving three years in which to commence an action "upon a liability created by statute," and therefore, the two-years limitation for commencing an action, found in said subdivision 3, of said section 18, applies to all actions brought by an employee to recover damages from a railroad company, on account of the negligence of a co-employee, whether the personal injury resulted from the negligence of the master, under the rule of the common law, or from the negligence of the co-employee, without the fault of the master.

Error from McPherson County.

Geo. R. Peck, A. A. Hurd, Frank Doster, and W. C. Campbell for plaintiff in error.

Frank G. White and Barker & Pancoast for defendant in error.

Horton, C. J.—On May 13, 1881, King brought his action against the Atchison, Topeka & Santa Fé R. R. Co. for injuries sustained by him in consequence of the negligence of the com-

pany's agents, and by the mismagement of other employees of the company, while he was attending to his duties as an employee of the company with other section hands, in handling, removing, and changing the location of iron rails used by the company in the construction of the track of its road. A general demurrer was filed to the petition, which, upon argument, was sustained at the October term of the court for the year 1881. King was granted leave to file an amended petition. This was filed November 17, 1881. A general demurrer was filed to this amended petition, which demurrer was sustained at the April term of the court for the year 1882. Thereupon King was given leave to file another amended petition. On July 29, 1882, the second amended petition was filed. To this petition another general demurrer was filed, which demurrer, at the October term of the court for 1882, was overruled. The company excepted. On December 20, 1883, the company filed an answer, alleging, among other things, that the injuries complained of by King in his petition did not occur to him within two year preceding the commencement of his action. Trial had at the April term for 1883. Judgment was rendered for King.

The company objected to the introduction of any testimony under the petition, and also demurred to the evidence offered in support thereof upon the ground that the cause of action therein stated was barred by the statute of limitations when it was commenced. Therefore the first question to be disposed of in the case is, whether the action was barred on the thirteenth day of May, 1881, the date the petition was filed. The second and third subdivision of section 18, of the Code read as follows:

"Second. Within three years: an action upon contract, not in writing, expressed or implied; an action upon a liability created by statute, other than a forfeiture or penalty.

"Third. Within two years: an action for trespass upon real property, an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud. The cause of action in such case shall not be deemed to have accrued until the discovery of fraud."

On the part of King it is contended that the action is founded on section 1, c. 93, Laws of 1874 (section 29, c. 84, Comp. Laws 1879), and as the action is not maintainable at common law, it is based upon a liability created by statute, and therefore the three-years statute of limitations applies. On the part of the railroad company it is insisted that the action was barred by the third subdivision of said section 18 of the Code. In support of this view counsel urge that the language, "injury to the rights of another, not arising on contract, and not hereinafter enumerated," defines a

class of injuries and carves such class out of the general rule given in the second clause; that the injury complained of by King is clearly one to his rights, not arising on contract, and not contained in any of the enumerated exceptions to the third subdivision of the section under consideration; that the only exception made by the statute is of the cases "hereinafter enumerated;" that if the legislature had intended that the rule should be subject to any case provided for in any previous section or subdivision, it would have expressed such intention. We think these latter views expressed by counsel are, in the main, correct. It is conceded if King had been injured by a co-employee, and the company had failed to exercise due care and diligence in employing or retaining such co-employee, the two-years statute of limitations would apply.

Again under section 422 of the Code, which provides for an action for damages by the personal representative of one killed by the negligence of another, the time for bringing the action is limited to two years. The statute should be construed, if possible, to harmonize its various provisions and give reasonable effect to all, and in reconciling conflicting clauses, force should be given to those clauses which would make the statute in harmony with other legislation on the same subject. As was said in Piller v. Railroad Co., 52 Cal. 45: "It is hardly to be believed that it was intended that a longer time should be given when the person injured was not killed."

The liability of the railroad company for the injury complained of accrued when the accident occurred, and by construing the words "an action for injury to the rights of another, not arising on contract," as qualifying and limiting subdivision 2 of said section 18, we give full force to the terms of subdivision 3, and leave the concluding clause of said subdivision to operate in other matters. We follow the true rule of construction and make the various provisions of the statute of limitations harmonize for the commencement of a cause of action for a personal injury resulting from the negligence of the master, and for one resulting from the negligence of a co-employee in the service of a railroad company without the fault of the master, and also for a cause of action by the representative of the injured party when the injury results fatally.

The trial court erred in overruling the demurrer to the petition; erred in admitting testimony against the objections presented; and erred in not sustaining the demurrer to the evidence. The judgment of the court below must therefore be reversed, and the cause remanded, with direction to sustain the demurrer to the petition, and enter judgment for the railroad company.

See Mobile & M. R. Co. v. Crenshaw, 8 Am. & Eng. R. R. Cas. 340; Tobin v. Houston, etc., R. Co., 8 Am. & Eng. R. R. Cas. 477.

BROWN

v.

MINNEAPOLIS AND ST. L. RY. CO.

(*Advance Case, Minnesota. March* 31, 1884.)

In the absence of controlling evidence to the contrary, an ordinary railway station agent is presumed to have general charge of the tracks in and about his station.

As respects such charge he is the fellow-servant of an engineer engaged in running a locomotive upon any of such tracks, and hence the common master of the two is not responsible to the engineer for injury which he may receive in consequence of the negligence of the station agent as respects the charge of such tracks.

APPEAL from an order of the District Court, Hennepin County.

Merrick & Merrick for appellant, Sheldon F. Brown.

J. D. Springer for respondent, Minneapolis & St. L. Ry. Co.

BERRY, J.—While plaintiff was running a regular passenger train upon defendant's railroad as a locomotive engineer, his engine (without apparent fault on his part) ran into some box cars standing upon the main track at Winthrop station and he was injured. The main track was that to which plaintiff's train was entitled. The freight cars had been placed there by persons not in defendant's employ, for their own convenience, and without other authority than the assent of the station agent. They were placed there about 3 P.M., and the collision occurred at 7:35 P. M., so that they had been there more than four hours. The train was due at the station at 7:27. The plaintiff put in evidence a rule of the company as follows:

"Station agents are responsible for safety of switches, which must always (except when a man is standing by) be kept right for trains running on main track. They must see that no cars are moved on side track so near the switches as not to properly clear the main track. Cars must not be allowed on the main track to load or unload, unless permission is obtained from train-master."

There was no evidence of any other rule or regulation, express or implied, as to the management of the tracks at or about the station, or as to the duties of a station agent. But we agree with the plaintiff's counsel that, in the absence of controlling evidence to the contrary, an ordinary railway station agent is to be taken as having general charge of the tracks at and about his station. This is a reasonable presumption of fact, founded upon the ordinary course of business, the common understanding of the public, and

the nature and necessities of the case. Of course, the station agent is always subject to the control of his superiors, and his general charge may be limited by rules and regulations; as, in this instance, by the prohibition to place cars upon the main track to load or unload without permission from the train-master, or by the assignment of some portion of what would ordinarily be his duties to some other person. The presumption spoken of appears to be assumed by the rule put in evidence.

As a consequence of these views it is clear that, upon the facts before stated, it was the duty of the station agent, as respects the plaintiff, to see to it that the main track was unobstructed and ready for his train, and that, in suffering it to be obstructed as it was, the agent was guilty of negligence through which plaintiff was injured. As respects the defendant, this negligence of the station agent is the only negligence of which plaintiff can or does complain. In this state of facts the trial court dismissed the action, being of opinion that the station agent was plaintiff's fellow-servant, and that, therefore (no charge of incompetence being made against him), plaintiff cannot recover for the injuries resulting from his negligence. It remains to consider whether this opinion is correct.

Prima facie the plaintiff and the station agent were fellow-servants, for they were acting together under one master in carrying out a common object. Gilman v. Eastern R. Co., 10 Allen, 233. They were engaged in the same common employment, under the same general control. Cooley, Torts, 544, and cases cited. They were subject to the same general control, coupled with an engagement in the same common pursuit. Wood, Mast. & Serv. §§ 426, 435, and cases cited. McGowan v. Railroad Co., 61 Mo. 528; Thomp. Neg. p. 1037, § 38. Is there anything to except the station agent from this prima facie relationship of fellow-servant to the plaintiff? He would be excepted only if he stood in the place of the master as a vice-principal, or, as it is sometimes expressed, as the master's alter ego. Malone v. Hathaway, 64 N. Y. 5. But one employed becomes a vice-principal as respects another only when he is intrusted with the performance of some absolute and personal duty of the master himself, such as the providing of proper instrumentalities with which the service required of an employee is to be performed, or the general management and control of the master's business, or of some branch of it. Drymala v. Thompson, 26 Minn. 40, and cases cited; Wood, Mast. & Serv. §§ 390, 438; Mullan v. P. & S. M. S. Co., 78 Pa. St. 25; Malone v. Hathaway, supra. In such cases the negligence of the vice-principal is the negligence of the master. Drymala v. Thompson, supra; Fay v. Railroad Co., 30 Minn. 231; Cooley, Torts, 560, 563; Corcoran v. Holbrook, 59 N. Y. 517; Quincy M. Co. v. Kitts, 42 Mich. 34; Booth v. Railroad Co., 73 N. Y. 38. But the general

management or control of the master's business, or some branch thereof, does not include the case of one simply charged with special duties performing them under the direction of the master, or under the control of superior officers. Malone *v.* Hathaway, supra.

Applying the rule that, the facts being undisputed, the relation of the station master to the plaintiff is a question of law (Marshall *v.* Schricker, 63 Mo. 309), in our opinion the station master in this case does not fall within the exception to the rule making him prima facie plaintiff's fellow-servant. Here there was no neglect to furnish or maintain suitable instrumentalities for the performance of plaintiff's proper service; and herein this case differs essentially from Drymala *v.* Thompson, supra, relied upon by plaintiff. There the track itself was defective. Here no complaint is made that the track was improperly constructed or in bad order. But the complaint, in effect, is that a proper track was improperly used or attended to by the station agent. A master is not, by reason of any absolute or personal duty on his part, liable to one employee for the improper use of proper instrumentalities by another. Floyd *v.* Sugden, 134 Mass. 563; Summersell *v.* Fish, 117 Mass. 312; Griffiths *v.* Gidlow, 3 Hurl. & N. 648; Gibson *v.* Pacific R. Co., 46 Mo. 163; Wood, Mast. & Serv. § 371; Brown *v.* W. & St. P. R. Co., 27 Minn. 162; Heine *v.* Chicago & N. W. R. Co., 17 N. W. Rep. 420.

Any other doctrine would obviously lead to most astonishing consequences. Neither is the station agent's case that of an officer exercising general control or management of the defendant's business, or of a branch thereof. He is simply charged with special duties as to his station, as a switchman sometimes is as to a particular switch or an engineer as to a particular engine. His duty is simply that of an operative. Farwell *v.* B. & W. Co., 4 Metc. 49; Gilman *v.* Eastern R. Co., supra; Zeigler *v.* Day, 123 Mass. 152; Crispin *v.* Babbitt, 81 N. Y. 516; McClosker *v.* L. I. R. Co., 84 N. Y. 77; Harvey *v.* Railroad Co., 88 N. Y. 481; Slattery's Adm'r *v.* Railway. Co., 23 Ind. 81; Moak, Eng. Rep. 340, 342; Flynn *v.* Salem, 134 Mass. 351. As it would seem, then, that there is nothing to take the station agent in this instance out of the category of a prima facie fellow-servant of the plaintiff, we are of opinion that the court below was right in holding him to be such fellow-servant and dismissing the action accordingly.

The order refusing a new trial is accordingly affirmed.

GIBBS et. al.

v.

GREAT WESTERN RY. CO.

(*English Law Reports*, 12 *Queen's Bench Division*, 208.)

In an action for compensation under the Employers' Liability Act, 1880, the evidence showed that it was the duty of F., a workman employed in the signal department of the defendants' railway, to clean, oil, and adjust the points and wires of the locking apparatus at various places along a portion of the line, and to do slight repairs, that for these purposes he was, with several other men, subject to the orders of an inspector in the same department, who was responsible for the points and locking gear, which were moved and worked by men in the signal boxes, being kept in proper condition, and that F. having taken the cover off some points and locking gear in order to oil them, negligently left it projecting over the metals of the line whereby injury was caused to a fellow workman:

***Held*, that there was no evidence for the jury that F. had "charge or control" of the points within the meaning of s. 1, sub-s. 5, of the Employers' Liability Act, 1880, so as to make the defendants liable for his negligence.**

APPEAL by the plaintiffs from the decision of the Queen's Bench Division making absolute a rule nisi to set aside a verdict for the plaintiffs, and to enter a nonsuit on the ground that there was no evidence of liability on the part of the defendants under the Employers' Liability Act, 1880. The action was brought in the Marylebone County Court by the widow and children of George Gibbs, to recover compensation in respect of personal injury resulting in death, sustained by Gibbs whilst in the defendants' employment.

The material facts appearing on the judge's notes are stated in the report of the case before the Queen's Bench Division, 11 Am. & Eng. R. R. Cas. 235. The sole question for the purpose of the present report is, whether there was evidence to go to the jury that one Fisher, a fellow workman with Gibbs, in the employment of the defendants, by whose negligence the injury had been caused, was a person having "the charge or control" of points upon the railway within the meaning of s. 1, sub-s. 5, of the Employers' Liability Act, 1880. As to this, Fisher's evidence-in-chief was as follows: "I am employed by the company in the signal department, and have charge of the locking apparatus. A youth was working under me. My duty is to clean, oil, and adjust the points and wires, and keep them oiled, and to see that the boy does his work." His evidence on cross-examination was: "My duties are to clean and oil the locking bars and apparatus. I had several

places to go to. I worked under inspector Saunders. A boy worked with me. I was not to say a foreman, only to this boy foreman of the cleaning. I did the cleaning, oiling, and adjusting with my own hand." The defendants called witnesses, and one of them, Townsend, an assistant engineer of the railway, said, "Fisher's duty was to oil the joints and lock lines, and do anything else in connection with the signals. He is little above a laborer. He has no charge of or control over the points. They are worked from the signal box," and another of the witnesses, Saunders, said, "I am inspector in the signal department of the Great Western Ry. Co. Fisher is one of my men. His duties are to clean and oil all in connection with the locking gear at twelve places on six or seven miles of line. He has a boy under him. Fisher's wages are 4s. a day, or 24s. a week. He has no control over the points. They are moved from the signal box. Fisher had to do slight repairs. I should go over the work every week, sometimes every day, to see that he did his duty."

T. L. Wilkinson for the plaintiffs.

Webster, Q. C., and Wightman Wood, appeared for the defendants, but were not called.

Lord Coleridge, C. J.—In this case we have to put a construction upon the 5th sub-section of the 1st section of the Employers' Liability Act, 1880, which enables a workman to recover from his employer for an injury inflicted upon him "by reason of the negligence of any person in the service of the employer, who has the charge or control of any signal, points, locomotive engine, or train upon a railway." It is, as the Master of the Rolls has pointed out, for the plaintiffs to make out that they are entitled to recover under the words of this section. Now the person who did the mischief was a man called Fisher, and the way he did the mischief was this: it being his duty to oil from time to time certain machinery contained in a box which was connected with the points, he took off the cover of the box, and having laid it on the permanent way of the railway, he left it there forgetting that he had done so, and the consequence was that a train came by, was knocked off the line, and the engine-driver whom the plaintiffs represent was killed. The first question is, had Fisher the charge or control of any signals? It is clear he had not. He had nothing to do with signals at all, either in the working or cleaning them. Then had he the charge or control of any points? He certainly had to do something from time to time to the machinery connected with the points, but he himself said he worked under the direction of Saunders, and Saunders was called and he proved, I think, that he was the person who had apparently both the charge and the control of the points, and that Fisher was only a workman under him, and was not a person who had either the charge or the control

of any points connected with the railway. I entirely agree that it would not be proper for the Court to give a narrow construction to an Act of Parliament which was intended to do away with what many persons felt to be rather a blot on the law, but nevertheless the words of the enactment should be construed according to ordinary rules; and should not be extended beyond their plain meaning. Here, as my Brother Mathew put it in the Court below, and what was really the fact, Fisher, who acted under the orders of the person who had the charge and control of these points, was held by the jury to be a person who had the charge and control of the points himself. To hold this, would be to extend the words of the Act of Parliament. The Court below were right in making absolute a rule to enter a nonsuit, and their judgment ought to be affirmed.

Brett, M. R. The action in this case was brought by the representatives of the deceased man for the benefit of his widow and children under Lord Campbell's Act, and upon the trial the County Court Judge left two questions for the jury, which if there had been evidence in support of them, would, in my opinion, have been proper questions for the jury. He asked the jury to say, first, whether Fisher was a person having the charge or control of the points upon the railway, and secondly, whether he had been guilty of negligence which caused the death of Gibbs. The question is, whether there was any evidence in support of those questions. As to the last, it has not been suggested that there was not evidence of negligence on the part of Fisher, but it is said there was no evidence to go to the jury as to the first question, whether he was a person who had either the control or the charge of the points within the meaning of the statute. Now the Act of Parliament has not made employers liable to any one of their workmen for the negligence of all his fellow workmen, but only for the negligence of some of them, and the question is, whether Fisher is one of those for whose negligence the employers are liable to one of Fisher's fellow workmen. This Act of Parliament having been passed for the benefit of workmen, I think it is the duty of the Court not to construe it strictly as against workmen, but in furtherance of the benefit which it was intended by Parliament should be given to them, and therefore as largely as reason enables one to construe it in their favor and for the furtherance of the object of the Act. But even taking that into account, the burden of proof in such a case as this is upon the plaintiffs to show that the negligence was that of a fellow workman, for whose negligence the employers are made liable by the statute. It therefore lay on the plaintiffs to show that Fisher was a workman who had the charge or control of the points, for it is obvious he had nothing to do with the signals, and the whole question is with regard to the points.

Now I cannot think that there is any color for saying he had the control of the points, and the only question is whether he is a person who had the charge of them within the meaning of the statute. I think that to be such a person he should be one who has the general charge of the points, and not one who merely has the charge of them at some particular moment. Now what evidence is there that Fisher was a person who had such general charge? It is true that he himself said he had the charge, but to act upon such evidence would be to make him the judge of the law and not the witness of facts. The plaintiffs were bound to show by evidence what were the duties of this man, when it would be for the Court to say whether having such duties he was a person who had the charge of the points as intended by the statute. Fisher himself, when cross-examined, said what his duties were, "my duties are," he said, "to clean and oil the locking bars and apparatus. I had several places to go to, I worked under Inspector Saunders." The meaning of working under Saunders, is that Saunders might order him at any moment to go to such and such a place and oil the bars and apparatus there, or not to go to the place he had intended to go to for the purpose of oiling the bars. The evidence which was given, showed, I think, that Fisher was only a little above a laborer, that he had to do manual work on what he was told to look to; and that he was not a person who had the charge of those things upon which he had to do such work under such circumstances. The Queen's Bench Division, therefore, rightly held that there was no evidence to support the plaintiffs' case.

Bowen, L. J. I agree. There is nothing in the evidence to show that Fisher either had the charge or the control of these points. It does not seem to me necessary now to decide what persons may fulfil the prescribed definition of the Act as being persons having the charge or control of the points. It is sufficient to say that Fisher was only at the most employed to do certain work on, and in respect of, the points under the order of somebody else. He cannot, therefore, have been the person himself who had the charge or the control of them.

Appeal dismissed.

English "Employers' Liability Act, 1880."—In England the law as to the responsibility of masters for the injuries of servants is completely altered by the Employers' Liability Act, 1880, 43 and 44 vict., c. 42. By virtue of said act any workman injured in the course of his employment may recover damages from the master wherever the injury in question is caused—

(1). By reason of any defect in the machinery used.

(2). By reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him.

(3). By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury results from his having so conformed.

(4). By reason of the act or omission of any person in the service of the employer, in obedience to the rules of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf.

(5). By reason of the negligence of any person in the service of the employer who has the charge or control of any signal points, locomotive engine, or train upon a railway.

In case death occurs, the administrators of the workman have a similar right of action.

It will be observed that by this act the liability of railroad companies is extended far beyond that of other employers, so that particularly they are made liable in almost all cases for injuries to a servant occasioned by the negligence of a co-employee. There are, however, certain salutary restrictions attached to the statute. Notice must be given to the company of the character and nature of the injury within six weeks after it occurs. Suit must be brought to enforce the statutory liability, in case of injury, within six months of the accident, and, in case of death, within twelve months from the time when the death takes place. The damages recoverable are in all cases limited to a sum equivalent to the estimated earnings during the three years preceding the injury of a person in the same grade of employment as the deceased in the same locality.

Many cases have since been decided on the construction of this act. See as to the requisites of the notice to be given to the company.

Stone v. Hyde, L. R. 10 Q. B. Div. 76; Moyle v. Jenkins, L. R. 9 Q. B. Div. 116; Keen v. Millwall Dock Co., L. R. 9 Q. B. Div. 482; Franks v. Siever & Co., 72 L. T. 69, and all as to other miscellaneous points.

Clarkson v. Musgrave, L. R. 10 Q. B. Div. 386; Harrington v. Westhrop, 72 L. T. 338; Banks v. Murrill, 72 L. T. 125; Bolton v. Midland R. Co., 72 L. T. 184; Smith v. Lofens, 72 L. T. 220; Batchelor v. Tilbury, 72 L. T. 271; Schaffers v. General Steam Navigation Co., 72 L. T. 283; Harrison v. Dawson, 72 L. T. 399; Warren v. Bates, 72 L. T. 400; Spinks v. Alexander, 72 L. T. 413; Clowes v. Atlantic Fuse Co., 72 L. T. 482; Topham v. Goodwin, 71 L. T. 10; Owen v. Maudsley, 71 L. T. 50, 299; Adams v. Nightingale, 71 L. T. 139; Marcy v. Hodson, 71 L. T. 140; McGinn v. Pilling & Co., 71 L. T. 156; Etherington v. Harrison, 71 L. T. 157; Hatfreed v. Enthoven, 71 L. T. 157, 211; Huxam v. Thorns, 71 L. T. 227; Pitman v. Bennett, 71 L. T. 229; Laming v. Webb, 71 L. T. 247; Harrington v. Westropp, 71 L. T. 338; Lovell v. Cherrington, 71 L. T. 356; Hunter v. Dickinson, 71 L. T. 338; Boatwright v. Downing, 71 L. T. 424.

In regard to railway companies, it has been decided that a "capstan man" propelling trucks at a station is to be considered as "a person in control of a train upon a railway," within the meaning of the act. An employee injured by the negligence of such "capstan man" may therefore recover against the company. Cox v. Great Western R. Co., L. R. 10 Q. B. Div. 106.

An engine-fitter acting under the orders of a foreman or superintendent may also recover for an injury done him in the course of his employment. Tuvitt v. Midland R. Co., 72 L. T. 87; see Hayslor v. Great Western R. Co., 71 L. T. 120.

PENNSYLVANIA CO.

v.

GALLAGHER.

(*Advance Case, Ohio Supreme Court Commission. April* 15, 1884.)

Where an employee of a railroad company, rightfully engaged in the repair of a freight car belonging to his employer, calls upon his son, a minor under eleven years of age, to render him necessary temporary assistance in the work, and the son while so assisting, without any negligence on his part or on the part of his father, is injured through the negligence of the agents and servants of another railroad company, in backing a train of cars upon a side track where the car is being repaired, the latter company is liable in an action by the son, for damages for the injury by him so received.

ERROR to the District Court of Richland County.

The original action was brought in the court of common pleas of Richland County, by the defendant in error, Charles Gallagher, an infant, by his father Daniel Gallagher, as his next friend, against the plaintiff in error, the Pennsylvania Co., to recover for injuries alleged to have been received by him, through the negligence of that company, while he was assisting his father in repairing a freight car.

On the twenty-fourth of June, 1879, the Pennsylvania Co. operated as lessee the line of railroad known as the Pittsburgh, Fort Wayne & Chicago Ry., and which at Mansfield, Ohio, crosses the Baltimore & Ohio R. R. The B. & O. R. R. Co. had five different tracks, running nearly parallel with Main Street in that city. One of these tracks was known as the "transfer track," which, by means of a switch at the north end, was connected with the main track of the Pittsburgh, Fort Wayne & Chicago Ry. At the south end of this transfer track, it was connected with the main track of the B. & O. R. R. It was the only means of transferring cars from one of these railroads to the other.

Daniel Gallagher, at the time his son was injured, was in the employment of the B. & O. R. R. Co., as car inspector and repairer. He had a shop near this transfer track and in the vicinity of the place where his son was injured. It was a part of the duty of Daniel Gallagher to inspect the cars coming into the yard of the B. & O. R. R. Co., and repair such as required repairs. His residence was about a mile from the shop; and on the twenty-fourth of June, 1879, Charles Gallagher, his son, then a boy under eleven years of age, as had been his custom, carried his father's dinner to the shop.

There was standing on this transfer track, a car loaded with coal, that had come over the B. & O. R. R. from Newark, and was

waiting to be transferred to the Pittsburgh, Fort Wayne & Chicago Ry. It needed repairs. It was in some manner broken underneath the car, where the draw bar is fastened. Daniel Gallagher did not know how soon the car would have to be transferred, and it was his duty to repair it before it left the transfer track. The north end of this track curves towards the west. North of this broken car, on the same transfer track, and between it and the Pennsylvania Co.'s track, were standing eight or ten freight cars, completely hiding the view of the north end of this track, from Daniel Gallagher and his son. The father, for the purpose of repairing the car, shovelled away the coal from over the bolts, got under the car with his son, found a strap iron bent down, put his jack under it and was raising it, and requested his son to assist him by holding a piece of wood under it, while the father forced it up against the iron. The father and son were both under the end of this car, engaged in the performance of this work, when a through freight train belonging to the Pennsylvania Co., without signal of any kind, by bell or whistle, backed and threw on to the transfer track six or eight cars with such force, as to strike with great force and violence against the freight cars that were so standing upon said track, and against the freight car that was so being repaired, and thereby caused the injury complained of by the defendant in error.

It was claimed by the plaintiff on the trial in the court below, that the defendant was negligent in not giving any signals of the intended use of the track on the occasion of the injury; and also, that on that occasion, the transfer track was being used in an improper manner by the Pennsylvania Co.

At the close of all the testimony offered by either party, in support of the issues joined in the cause, the defendant among other requests, asked the court to charge the jury as follows:

"Fourth—Even although the defendant varied from the usual manner of using this track in question, yet if the plaintiff was there not as an employee of the B. & O. Co., he cannot complain of the negligence unless you find that the defendant's agents knew that he was there, and wilfully injured him.

"Fifth—The mere fact that his father took the plaintiff with him, would not invest him with the capacity of an employee of the B. & O. Co."

The fourth and fifth charges the court gave to the jury, and added the following qualification to said fourth request: "Gentlemen, if the plaintiff at the time he received the injury was wrongfully upon the track, then act upon this as the law;" to which qualification the defendant, by counsel, excepted.

And to said fifth request the court added the following qualification: "This, gentlemen, is correct. But if you find that the defendant and the B. & O. Co. were each rightfully in the

joint use and occupation of this transfer track, and the father of this plaintiff then in the employment of the B. & O. Co. duly authorized, was engaged in repairing a car upon this track, that the plaintiff brought to him his dinner, and that while engaged in repairing said car shortly thereafter, the father requested plaintiff to render him necessary temporary assistance, to enable him, the father, to perform said work of repairing said car, I will submit to you the question as to whether the father, under the facts of this case, was authorized to thus employ his son for the B. & O. Co., to assist him thus in the manner shown by the evidence. If he was thus authorized to employ the plaintiff, then the plaintiff was rightfully upon the track;" to all of which qualification the defendant by counsel excepted.

The jury returned a verdict for the plaintiff. Judgment was entered accordingly. A bill of exceptions was taken embodying all the testimony, and on error, the district court affirmed the judgment of the common pleas; to reverse which judgment of affirmance, a petition in error is filed in this court.

Rush Taggart for plaintiff in error.

Jenner & Tracy for defendant in error.

Dickman, J.—It was the province of the jury to inquire whether the transfer track was used in an improper manner by the Pennsylvania Co., at the time Charles Gallagher was injured; and whether the company, through its agents and servants, negligently, and without giving the usual or any signal or notice to him or to his father, moved the cars upon the transfer track, and thus inflicted the injury received. Upon a careful examination of all the testimony disclosed by the record, we are not satisfied, that the verdict of the jury was so clearly against the weight of the evidence, as to require that it should be set aside and the judgment reversed, unless the son was assisting his father under such circumstances, or the son's conduct at the time was such, that ordinary care and prudence to prevent the injury could not be exacted of the company. Landis *v.* Kelly, 27 Ohio St. 567.

It is not necessary to inquire, whether the son, notwithstanding his immature years, would be responsible for a failure to use the ordinary degree of care, as it is not claimed that there was any negligence on his part or on the part of his father—if the father's negligence could be imputed to him. But it is contended that the same relations did not exist between the Pennsylvania Co. and the son which existed between that company and the father; that the same measure of duty was not owing by that company to the son which was owing to the father. Daniel Gallagher, it is said, was an employee of the Baltimore & Ohio R. R. Co., and was rightfully engaged in the line of his duty, while his son was not such an employee; that the father had no authority from his

employer to call upon his son to assist him; and that the son rendered the required assistance at his peril, notwithstanding the Pennsylvania Co. might fail to use ordinary care and prudence.

As appears by the evidence, Daniel Gallagher was the car inspector, and in that capacity the duty devolved upon him to attend to the repairing of cars. His employer must be regarded as having invested him with all the necessary powers incident to his employment. If A. employs B. to operate his factory, giving to him the entire charge over the same, from the nature of the employment B. is vested with power to do such acts as may be necessary for the conduct of the business in which he is employed, in its ordinary and usual manner; as, if machinery should break, to get it repaired, and generally to do any acts essential to the discharge of his duties and the prosecution of the business usually intrusted to persons in his position. Wood's Law of Master and Servant, 500.

In the business of repairing the broken car, Daniel Gallagher was authorized to bring to his aid any instrument or agency necessary to the proper performance of his work. He availed himself of the necessary temporary assistance of his son as he used other instrumentalities under his control. He did not delegate to another, a charge committed to himself personally because of his acknowledged skill and fitness, but directed his son to render assistance which was merely mechanical, and under the supervising guidance and control of the father's mind and will. Presumptively, Daniel Gallagher did not exceed his powers in calling upon his son for temporary assistance; and though a contingency might have been possible, in which the Baltimore & Ohio R. R. Co. might have raised a question as to the son's right to recover of it, in an action for injuries received through his father's carelessness, such possible contingency would not excuse a want of due care on the part of the Pennsylvania Co. Charles Gallagher was not a trespasser, nor wrongfully on the premises where he was injured. And we cannot reach the conclusion, that he bore such a relation to the Baltimore & Ohio R. R. Co., that while rendering needed assistance to that company, in compliance with the directions of its agent with such implied authority, he was placed beyond the pale of protection against the carelessness of the plaintiff in error.

In another aspect of this case, it would seem that if the Pennsylvania Co. could have recovered of the Baltimore & Ohio R. R. Co., for any injury received by it at the hands of Charles Gallagher while under his father's direction and control, the son was not such a stranger to the service of the Baltimore & Ohio R. R. Co. as to debar him from all remedy for injuries suffered by him through the negligence of the agents and servants of the Pennsylvania Co. That the Pennsylvania Co. would have such right of action, is the doctrine of well adjudged cases.

Simons *v.* Monier, 29 Barb. 419, was a case in which the defendant owned a farm, his servant residing on it. In the course of farming the servant cut a quantity of brush and piled it in heaps adjacent to the plaintiff's land. He then sent his son, an infant, to set fire to it, and the fire extended to the plaintiff's land destroying a quantity of timber thereon. It was held that the act of the son was the act of the father—the defendant's servant—he being under his control; and that the defendant was liable. Although the act was done by the hand of the son, the hand was directed, guided and controlled by the mind and will of the father. See also, Althorf *v.* Wolfe, 22 New York, 355; Booth *v.* Mister, 7 Carr. & Payne, 66.

In the view which we take of this case, the defendant was not prejudiced by the qualifications added by the court to the fourth and fifth requests given in charge to the jury. We are therefore of opinion that the judgment of the district court should be affirmed.

Judgment accordingly.

PENNSYLVANIA CO.

v.

LONG.

(*Advance Case, Indiana. December* 18, 1883.)

In an action by a mother against a railroad company to recover damages for the death of her minor son while coupling cars for the company defendant, in which occupation he had engaged without his mother's consent: *held*, that declarations made by the son in his lifetime to the effect that he knew how to couple cars were not admissible in evidence.

In an action by a parent against a railroad company to recover damages for causing the death of the plaintiff's minor son employed by defendant in a dangerous occupation, the plaintiff may recover if the employment was without his consent, even though it was not against his known will.

Where an inexperienced minor was employed by a railroad company to couple cars, and was set to couple two passenger cars, one with an ordinary draw bar and one with a Miller draw bar—no special instructions being given him—and while so doing the said minor was killed: *held*, that the company was not guilty of culpable negligence per se but that the question of negligence was for the jury.

APPEAL from Gibson Circuit Court.

J. Pickens for appellant.

Riley, Johnson & Niblack for appellee.

PICKNELL, C.—This was an action by the appellee, a widow, against the appellant, to recover damages for the death of James

B. Long, her son, seventeen years old, who was killed in the appellant's service while undertaking to couple two of its cars at the city of Vincennes.

The complaint stated that the plaintiff's son was living with her and had no guardian; that defendant, without the knowledge or consent of the plaintiff, and against her will, employed her son as a workman; that he had no experience in the work and was ignorant of its dangerous character; that the work consisted in part of making up trains which was very dangerous; that in said work he was required by the defendant to assist in coupling two passenger cars on a sharp curve, which cars had couplings of different shapes and unfit for coupling together, one of them being a straight drawhead, and the other a crooked drawhead called the Miller patent, intended to fit in another crooked drawhead, and which would not readily connect with a straight drawhead; that the deceased, while one of said passenger cars driven backward by an engine toward the other car, was directed by defendant to work at the rear of the moving car, to couple it with the other, and when the cars came together, the said drawheads instead of meeting together and keeping the platform of the cars apart, as they would have done if properly constructed, passed each other and let the platforms come together, so that they caught the deceased and killed him without fault of the deceased or of the plaintiff to plaintiff's damage $5000. The defendant answered by a general denial.

The issue was tried by a jury who returned a verdict for the plaintiff for $1000, with answers to the defendant's interrogatories as follows:

1. Does the evidence show that, the injuries from which the plaintiff's son died, were received while making a coupling between the couplers known as the common draw bar and the Miller coupler?

Ans. Yes.

2. Does the evidence show that both these kinds of couplers were in common use together, upon the railroads of Indiana and at Vincennes, at and about the time of the injury?

Ans. No.

3. Was the plaintiff's son informed how to make the coupling?

Ans. No.

4. Was the plaintiff's son cautioned against the danger involved in making couplings?

Ans. Yes

A motion for a new trial, and a motion in arrest of judgment by the defendant were overruled. Judgment was rendered on the verdict and the defendant appealed.

The errors assigned are overruling the said motions.

Ten reasons were presented for a new trial, but the first of these is abandoned by the appellant, the second is, that "the court erred in excluding from the jury the evidence of Robert Henry, a witness for defendant, which evidence consisted of statements made by James B. Long at and during the time he was in the employment of the defendant, and during the four or five days next before the day of the injury, that the said James B. Long knew how to couple cars, and had made couplings often before that time, in the defendant's yards at Vincennes."

As against the plaintiff, these declarations of her son in her absence were mere hearsay, and were properly excluded. The right of the mother could not be defeated or qualified by such declarations of the son. Such declarations, in reference to an employment entered into without the mother's consent, could not affect her legal rights resulting from such employment and its consequences.

The third cause for a new trial is, that the court erred in giving instructions to the jury.

Instruction No. 2, given by the court of its own motion, is as follows:

The facts necessary for the plaintiff, under the allegations of her complaint, to prove in order to entitle her to a verdict are the following:

"That in the month of December, 1879, James Long was in the employment of the defendant, and at said time, while in the line of his employment and engaged in the effort to couple two passenger cars, he was crushed and killed between the platforms of the two coaches. That the plaintiff was the mother of said James, and that his father was dead at said date; that without the plaintiff's consent, the defendant employed said James, he being under twenty-one years of age, to work in its railroad yard, and that among the duties of said employment was the coupling of cars; that on the night he was killed, he was engaged under the direction of the defendant in assisting to make up a passenger train, and in pursuance of the direction of the defendant was required to pass, and did pass on the track between two cars in order to effect the coupling, and that, while he was between the cars, and owing to the want of adaptation to each other of the Miller patent and common draw bar couplers on the two cars, the platforms of the cars came so nearly together as to crush and thereby kill him; that the effort to make such coupling was dangerous to the person making it; that the plaintiff incurred some expense in his burial, or that his services from the period of his death until of full age would have been of some value to her.

It is claimed that this instruction is erroneous because it states that there may be a recovery by the parent where the employment of the minor is without the parent's consent; the appellant claims

that there can be no recovery by the parent unless the employment was not only without her consent, but was also against the known will of the parent.

In Grand Rapids, etc., Co. v. Showers, 71 Ind. 451, the averment and the proof were that the employment of the child was against the parent's will, and this court held that such an employment might be the basis of liability. Where, however, the employment is without the parent's consent, and nothing further is shown, it is presumptively against the parent's will.

The right of the mother to recover in such cases is recognized in the O. & M. R. R. Co. v. Tridall, 13 Ind. 368; Hollingsworth v. Swedenborg, 49 Ind. 378; Rodges v. Smith, 17 Ind. 323; Long v. Morrison, 14 Ind. 595; Boyd v. Blaisdill, 15 Ind. 73.

There is no intimation in any of these cases that the liability of the employer to the parent cannot exist unless the child was employed against the parent's known will.

We think the instruction was not erroneous in this particular.

The appellant's counsel objects to instruction No. 2. That it told the jury substantially that, if the deceased being under twenty-one years of age, was put at work by the defendant in a dangerous place, the plaintiff ought to recover; but such is not the effect of the instruction. Its statement is that, if the deceased being under twenty-one years of age, was employed by the defendant without the plaintiff's consent, and was set to work coupling two cars, one of which had a Miller patent coupler, and the other a common draw bar coupler and that if this was dangerous work, and if by reason of the want of adaptation to each other of the two couplers, the platforms of the cars came together and crushed and killed the deceased, then upon proving such facts the plaintiff could recover.

The statute provides that the mother may maintain an action for the injury or death of a child. R. S. 1881, sec. 266. But the death must be caused by the wrongful act or omission of another. R. S. 1881, sec. 284.

The mere employment of a minor without his parent's consent could not be the proximate cause of his death, and merely putting him in a dangerous employment would not create liability for his death thereby, unless it appeared that he was inexperienced, and that the defendant failed to instruct him how to avoid the danger. But if the couplers were not fit to couple, one of them being straight and the other crooked, and if by reason of such unfitness the couplers did not meet, but passed each other and let the cars come together and crush the deceased, then if the law is that the use of such couplers is conclusive evidence of culpable negligence, the second instruction was right, otherwise it was wrong.

The instruction assumed that the use of such couplers was culpable negligence. In this we think the court erred. The rule in

relation to negligence of a railroad company in the use of machinery and appliances should have been stated, and it should have been left to the jury to determine whether in the present case, applying that rule to the facts, culpable negligence existed.

In Lake Shore, etc., Co. *v.* McCormick, 74 Ind. 440, this court said: "The master's obligation is not to supply the servant with absolutely safe machinery, or with any particular kind of machinery, but his obligation is to use ordinary and reasonable care not to subject the servant to extraordinary or unreasonable danger."

In Umback *v.* Lake Shore, etc., Co., 83 Ind. 91, this court said: "The obligations of the master to provide suitable and safe machinery and appliances does not, however, impose upon him the duty of using extraordinary care and diligence, but does require him to be ordinarily careful and diligent."

In Fuller *v.* Jewett, 80 N. Y. 46, it is said: "But the duty of the master to furnish suitable and safe machinery and to keep the same in repair is relative and not absolute. He is only bound by himself and his agents to exercise due care to that end."

In Louisville & Nashville R. R. Co. *v.* Orr, 84 Ind. 50, it was held erroneous to instruct a jury that "it would be negligence on the part of the defendant to use a crab for hoisting timbers that was defective in its construction, when said crab could have been made complete and safe, or when there were others to be secured that were complete and not dangerous." The court said: "This instruction renders the master liable if the machinery is defective, no matter how much care and prudence have been exercised in its selection and use. The defendant, in the absence of negligence was not liable because he did not have the best crab in use."

These cases show that the instruction under consideration was erroneous in assuming that it was culpable negligence in the defendant to use the Miller patent coupler to couple with a common draw bar coupler. The case of St. Louis, etc., R. R. Co. *v.* Valeries, 56 Ind. 511, so far as it is in conflict with the subsequent cases above cited, cannot be followed. It was upon this point condemned in Umback *v.* Lake Shore, etc., Co., supra, and in Lake Shore, etc., Co. *v.* McCormick, supra.

The employee in this case was a minor. It is true that it tends to show gross negligence in a railway company to employ an inexperienced person, knowing him to be such, in any hazardous and dangerous business unless such company makes known and explains fully the hazard and danger and instructs such person how to avoid the danger. It is also true that youth is evidence of inexperience and that in general greater strictness of the rule should be required in the employment of minors than in the employment of persons of mature age. But these considerations do not change

the rule laid down in the cases above cited and herein relied on.

Instruction No. 2 cannot be sustained because it asserts absolutely as matter of law that if the work was dangerous and the deceased was killed by reason of the want of adaptation to each other of the two couplers the plaintiff would have a right to recover, whereas it was the office of the jury to determine whether under the law correctly stated, culpable negligence existed on the part of the defendant. As the judgment must be reversed for the error in instruction No. 2, it is unnecessary to consider the other errors assigned.

The judgment ought to be reversed. Per curiam.

Judgment reversed.

See Texas and Pacific R. Co. v. Carlton, and note, infra.

TEXAS AND PACIFIC RY. CO.

v.

CARLTON.

(*Advance Case, Texas. November* 30, 1883.)

The mere act of a railroad company employing a person less than twenty-one years of age, with the father's consent, to perform a given kind of labor, and afterward, the minor consenting, placing him in a different position and employment, will not constitute such negligence as will sustain an action under the statute for damages.

A minor come to years of discretion may contract with a railroad company without his father's consent to enter into its employ. In such case the relation of master and servant is constituted, and in case of the minor's injury or death the right of the father to recover from the company depends upon the duties subsisting by reason of this relation.

A railroad company is not bound to receive and haul the car of another road so defectively constructed or otherwise unsafe as manifestly to imperil the life and limb of its employees.

APPEAL from Kaufman County.

Leake & Henry for appellant.

J. J. Hill for appellee.

STAYTON, J.—The cause of action in this case, as stated in the brief of counsel for appellant, is found to be substantially correct, and is as follows:

"Plaintiff brought this suit against the defendant for damages, alleging that defendant unlawfully and wrongfully procured and caused the plaintiff's son, William Jefferson Carlton, of the age of eighteen years, or about that age, under the parental authority and

control of plaintiff, without his consent, to quit the service of plaintiff and enter into that of defendant, whereby plaintiff was deprived of the services and society of his son for a long time, to wit: thirty days, and greatly troubled in mind; that his son, while in defendants employment as aforesaid, and working on its line of railroad between Marshall and Jefferson, in the State of Texas, was, on January 16, 1880, injured so that on the 24th day of said month he died; that the son was sober, industrious and dutiful, and plaintiff was old, poor, infirm and needy; that deceased had for years contributed to the support of plaintiff, who had reasonable expectation of its continuance; that his son, prior and up to the time of his injury, earned $2.50 per day, most of which was applied to the support of plaintif, and plaintiff had reasonable expectation of receiving support from him to the amount of $500 annually during the plaintiff's life, and plaintiff, at the death of his son, had reasonable expectation of fourteen years continuance of life.

"Plaintiff further alleges that he is the only surviving parent, and only beneficiary of the said William Jefferson Carlton; that said injuries, wounds and bruises, of which his son died, were caused by the negligence of defendant, and by the defendant's then and there using cars of dangerous construction to the employees engaged in coupling them; that said cars were of peculiarly dangerous construction to said William Jefferson Carlton, while engaged in coupling them, by reason of their having "duffing bumpers" on their ends; that his son was not informed, or skilled, in said dangerous business of brakeman, all of which was known to defendant; that his son was wanting in the caution and discretion necessary in such dangerous employment, and defendant, who knew said facts, did not exercise due care and prudence in employing him."

He charges that said injuries were occasioned by some negligence on the part of defendant—some want of care, skill and precaution on its part unknown to plaintiff.

There was a judgment for the appellee for $2500. On the trial it appeared that on or about December 26, 1879, the son, with the consent (or at least with the knowledge, and without objection) of the father, was employed to work in the appellant's yard, at Sherman. The testimony is somewhat conflicting as to what his duties were in the yard, and also as to the familiarity of the son with the duties of a brakeman.

On the same day the son was employed he was sent off on the road as a brakeman, and this seems to have been done contrary to the wish of the father. After being absent for some days the son returned home, and was then told by his father to remain at home until his return in the evening, but the son did not do so, and returned to the train, with which he seems to have stayed, acting as

brakeman, until about January 16, 1880, when, in attempting to couple cars, he was injured so that he died about the 24th of the same month. There is no evidence showing that the cars which the son was coupling at the time he was injured, were in any respect defective, nor that the injury resulted from any neglect of the appellant to furnish safe road, cars and appliances, and careful and competent servants to conduct its business. It appears that the son was in his nineteenth year, a man in stature, weighing about 180 pounds, and that he was a person of ordinary intelligence and prudence for one of his years.

In instructing the jury the court, among others, gave the following charge: "If the jury is satisfied from the evidence that plaintiff is the surviving father of William Jefferson Carlton, and that the said William Jefferson Carlton was employed by the defendant as a brakeman upon its trains, and that while he was engaged coupling in its cars he received injuries from which he afterward died, caused by the negligence, or carelessness, of the defendant, its agents, servants or employees, and that the deceased did not, by his own negligence, or carelessness, contribute to his own death, the jury should find for the plaintiff."

Throughout the case the court seems to have been of the opinion that the act of sending the son upon a train without the consent of his father, to act as brakeman, was in itself an act of negligence, such as would not only prevent the relation of master and servant from existing between the railway company and the son, but as would also enable the father, under the statute, to maintain an action for damages sustained by the death of his son. There was, as before said, no proof of negligence by the appellant, such as would render it responsible in damages for an injury, resulting in death, to an employee. If the action was based upon a father's common law right, for loss of services of his son, it may be true, although the injuries which the son received resulted in death, that he could maintain his action, if the son was employed without his consent, and was thus withdrawn from his service, or if employed with his consent to perform certain labor, his son was afterward, without his consent, placed at labor more hazardous, through which he was injured.

The petition and charge of the court, however, presented a case based upon the statute, giving to certain persons an action for injuries resulting in death, and it is, therefore, unnecessary to consider what would be the measure of damages in an action for loss of service alone.

We have, then, the question, whether the mere act of employing a person less than twenty-one years of age, with the consent of his father to perform a given kind of labor, and afterward, the minor consenting, placing him in a different position and employment, will constitute such negligence as will sustain an action under the

statute for an injury resulting in the death of the son. The evidence tends to show that the duties of brakeman on the road did not expose him to greater danger than would employment in the yard.

This question must be determined by considering whether, if the son had been injured, but not fatally, under the same circumstances in which he was fatally injured, he could have maintained an action for such injury. The statute provides that, "The wrongful act, negligence, carelessness, unskilfulness, or default mentioned in the preceding article must be of such character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury." (R. S., Art. 2900.)

In determining whether the party injured could have maintained an action had be survived, we must look to his relation to the railway company, for the same liability does not exist to all persons for an injury inflicted. The statute under which this action is brought does not change in any respect the rules well recognized for the determination of the liability of a railway company either to a passenger or employee. To a passenger injured by the negligence of the employees of a railway company acting within the line of their employment, a liability exists; not so in all cases in which an employee is injured by the negligence of some other person engaged in the same common employment. Upon the contrary, the cases are exceptional in which the employee can recover damages resulting from the mere negligence of other persons in the common employment, and are confined to cases in which the employee is by the master empowered to do those things which pertain to the master's duties to the servant, as well as to all other persons, and even these cases are subject to qualification.

While it may have been wrongful as to the father, to employ the deceased in a business contrary to his wish, yet this did not deprive the son of the power to make a contract by which he might obtain necessary employment; and a contract so made, created between the railway company and the son, the relation of master and servant, the duty of the former, however, in reference to care toward the latter, increased in proportion to his want of capacity. The contract as between them would fix the relationship; the duties arising from it on the part of the master, in reference to the care due to the minor, would vary with the character and hazard of the employment, and the intelligence and capacity of the child to comprehend and avoid any danger attendant in the business in which he is engaged. Such we understand to be the rule laid down in Railroad Co. *v.* Miller, 51 Tex. 274, and in Hamilton *v.* G. H. & S. A. Ry., 54 Tex. 562, and in Coombs *v.* New Bedford Cordage Co., 102 Mass. 572; Hill *v.* Gust, 55 Ind. 45; N. & C. R. R. Co. *v.* Elliott, 1 Caldwell, 620; King *v.* B. & W. Ry., 9 Cushing, 112;

C. & G. E. R. R. Co. v. Harney, 28 Ind. 32, 2 Thompson on Negligence, 977; O. & M. R. R. v. Tindall, 13 Ind. 367.

The risks incident to the performance of the duties of brakeman were within the contract of service made between the appellant and the deceased, and the same rules as to liability and obligation would have to be applied between them, as would be applied in any other case in which the servant is injured while in the master's employment, limited only by the requirement resting upon the master, more fully to advise an inexperienced minor of any danger incident to the business than he is required to do in the case of an experienced person engaged in the same business.

It has been frequently held that where a master hired to another a slave to work in a given business, or place, and the hirer subsequently, without the consent of the owner, placed the slave in a business, or place, more hazardous than that contemplated in the original contract of hiring, a recovery could be had for the value of the slave lost while engaged in, and by reason of the more hazardous business, or place; but these cases bear no analogy to the case before us. The slave had no power whatever to contract, nor in any way to create the relation of master and servant between himself and another person. The minor has such power, and while as against his father he cannot defeat his right to have his services by contracting them to another person, yet as between himself and such other person, the relation of master and servant may be created by his contract, and especially so when such contract is made for the purpose of obtaining employment necessary to his own support, as in this case it appears to have been.

The father seems to have been unable to make a support, by reason of his health, for himself and family, and for some time prior to the death of his son, the latter seems to have obtained employment wherever he could find it, and out of the proceeds of his labor to have supported himself, and to have contributed to the support of his father and the other members of the family. Under such circumstances, to deny the right to contract and to establish thereby the relation of master and servant in some cases, would be to deny the right to live by honest toil. The law imposes no such disability as sedulously as it guards the rights of minors. Had the deceased not died, but brought this suit to recover damages for the injuries received in the manner shown in the record, he certainly would not have been heard to say, that the employment of himself under the circumstances was such an act of negligence as would have authorized him to recover. He would have had to show such facts as would ordinarily entitle an employee of age to recover, unless it appeared that his inexperience and want of knowledge of the danger of his position, and proper manner of avoiding it, was such as to have made it the duty of appellant to warn him upon these matters, and that it had failed in this duty.

In reply to the answer of appellant, averring due care in having safe road, cars, appliances thereto, and careful and capable servants, and alleging the want of due care in the person injured in the performance of the duties which he had undertaken, if the action was by the person injured, would it avoid such an answer for the injured party to reply, "Yes, this is all so, but at the time you employed me you did so with a knowledge that I was a minor, and that my father did not consent to the contract I made with you?" As between the parties to the contract, such a reply would be of no avail. We are of the opinion that the charge of the court did not present the true issues in the case, and that it was misleading, in that it ignored the fact that the injured party was an employee, and left the jury to infer, as counsel claim in this court, that the simple fact of hiring the deceased, and putting him to work in a place, and at a business in which his father did not wish him to labor, was, of itself, such negligence of the appellant as would entitle the appellee to a verdict. In view of the fact that it is not shown by the evidence that the cars which belonged to another company, and which were being hauled by the appellant's road, and in the coupling of which the deceased was injured, were defective, or in any way unsafe, although constructed, in some respects, differently from those owned and operated by appellant, it does not become necessary to determine the degree of care necessary to be exercised by one railway company in reference to the construction and safety of cars belonging to other roads, which it may haul over its own road.

It is, however, certainly true that statutes of this State do not compel any railway company within this State to receive and haul the car of another road which is so defectively constructed, or otherwise unsafe, as manifestly to imperil the life and limb of a single employee. Nor do we consider it necessary to consider the question of proximate and remote cause in view of what we have already said. For the errors indicated the judgment is reversed and the cause remanded.

Minor Runs Risks of Employment.—The law is clear that where a minor is hired as a servant he undertakes to run all the ordinary risks of his employment, including of course the negligence and carelessness of his fellow-servants. A railroad company employing a minor is not therefore liable for an injury resulting from such cause. King *v.* Boston, etc., R. Co., 9 Cush. 112; Chicago, etc., R. Co. *v.* Harney, 28 Ind. 28; Ohio, etc., R. Co. *v.* Hammersly, 28 Ind. 371; Nashville, etc., R. Co. *v.* Elliott, 1 Coldw. (Tenn.) 611; Gartland *v.* Toledo, etc., R. Co., 67 Ill. 498; MacGinnis *v.* Canada S. Bridge, 8 Am. & Eng. R. R. Cas. 185. But see Hamilton *v.* G. H. & S. A. R. Co., 4 Am. & Eng. R. R. Cas. 528.

A contract for services made with a minor is not invalid simply because it is not entered into with the parent or guardian. It is only voidable at the election of the parent or guardian. Gartland *v.* Toledo, etc., R. Co; Nashville, etc., R. Co. *v.* Elliott, 1 Coldw. (Tenn.) 611. But see Houston & T. C. R. Co. *v.* Miller, 49 Tex. 322.

Where, however, a minor is employed contrary to the wish of the parent this is a wrong done to the parent, and if the minor is injured in the course of his employment the parent may recover damages. Grand Rapids & I. R. R. Co. v. Showers, 2 Am. & Eng. R. R. Cas. 9; Hamilton v. G. H. & S. A. R. Co., 4 Am. & Eng. R. R. Cas. 528.

The company is bound, however, to fully explain to a minor in its employ all the risks and dangers incident to his position and must not expose him to extraordinary peril. St. Louis, etc., R. Co. v. Valirius, 56 Ind. 511; Railroad Co. v. Fort, 17 Wall. 553; Grizzle v. Frost, 3 Fost. & Fin. 622; Hill v. Gust, 55 Ind. 45; Lewis v. McAffe, 32 Ga. 465; Memphis, etc., R. Co. v. Jones, 2 Head, 517; Allison v. Western, etc., R. Co., 64 N. C. 382; Chicago, etc., R. Co. v. Harney, 28 Ind. 28.

PEORIA AND PEKIN UNION RY. CO.

v.

CLAYBERG, Admr.

(107 *Illinois Reports*, 644.)

On the trial of an action brought by an administrator against a railway company, to recover for the defendant's negligence causing the death of the intestate, the defendant, in order to show that the deceased was not observing due care at the time he was killed, asked a witness to state if he ever saw the deceased get on, or attempt to get on, trains, and counsel stated that he expected to prove by this and another witness that the deceased was in the habit of jumping on trains: *Held*, that the evidence sought and proposed was inadmissible, as its effect was clearly to raise a collateral and immaterial issue.

If facts and circumstances are proved which lead the mind with certainty to the conclusion that other facts and circumstances are true, such latter facts and circumstances may be accepted and acted upon by the jury, and it is not erroneous to so instruct them.

In an action against a railway company to recover damages for negligence resulting in the death of plaintiff's intestate, who was struck by a moving car at a street crossing, the court instructed the jury that if they believed, from the evidence, that the crossing of the defendant's railroad on the street was used by persons passing frequently between the hours of six and seven o'clock, A.M. and P.M., and that the defendant knew it, and that defendant's servants and employees were switching and moving cars on said crossing between said hours, at a time when it was dark, by pushing them across said street, then it was the duty of the defendant to take some means to warn the persons passing, or to prevent accident to them, and if the defendant did not do so, it was guilty of negligence; and if such negligence was the cause, or principal cause, of the death of the intestate, and if the jury also believe, from the evidence, that the intestate was not guilty of negligence which contributed to the injury, they should find a verdict of guilty: *Held*, that there was no error in the instruction to the prejudice of the defendant, and that it stated the rule as to comparative negligence more favorably to the defendant than it was entitled to have it laid down.

It is no objection to an instruction, in an action to recover for negligence, that it fails to define what might or might not constitute negligence under

certain claimed theories of proof, where no fundamental principle or indispensable condition to a recovery is omitted. Neither is it error in such an instruction to omit matters merely suppletory in their character, which might properly be presented in a separate instruction.

In a case involving the comparative negligence of the parties, an instruction stating that the omission to do certain acts by the defendant was culpable negligence, and if the injury was the result of such negligence, and that the party injured was not guilty of negligence contributing to the injury, the jury should find the defendant guilty, is not subject to the objection that it singles out and gives undue prominence to the question of the omission to perform the acts.

In an action to recover damages growing out of alleged negligence, the court instructed the jury that certain omissions on the part of the defendant, if found from the evidence, were "culpable" negligence: *Held*, no error, as the word "culpable" was used in the sense of "blamable."

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria County.

Stevens, Lee & Horton for the appellant.

Plaintiff's second instruction, while it charges that the company was bound to take some means to warn passers over the street, fails to state the duties which the law required of the passers. It was a common highway, and the law required both to use reasonable and prudential precautions to avoid accident and danger. Chicago & Northwestern Ry. Co. *v.* Hatch, 79 Ill. 137.

The fourth instruction was wrong for several reasons. First, it singled out and gave undue prominence as to the question of the omission to ring a bell or sound a whistle when the train started, as constituting negligence. It has been held repeatedly, that an instruction which singles out and gives undue prominence to certain facts, ignoring other facts proved, and of equal importance to a proper determination of the case, is erroneous. Lake Shore & Michigan Southern R. R. Co. *v.* Berlink, 2 Bradw. 434; Calef *v.* Thomas, 81 Ill. 478; Homes *v.* Hale, 71 id. 552; Hewett *v.* Johnson, 72 id. 513; Evans *v.* George, 80 id. 51; Anderson *v.* Warner, 5 Bradw. 417.

It was also faulty in telling the jury not only what constituted culpable negligence, but in the use of the word "culpable," and in not instructing them as to any care observed in crossing the street by the employees, notwithstanding the omission to ring the bell or blow the whistle when the train was started. Our courts have never held that the omission to ring the bell or blow the whistle was "culpable negligence." Negligence is a question of fact for the jury, and not a question of law. Chicago & Alton R. R. Co. *v.* Pennell, 94 Ill. 448.

H. W. Wells for the appellee.

It is contended that the deceased was a trespasser; that he was on the company's private ground without license, and that the killing was not malicious, and the company is not liable. The

case of Lake Erie & Western Ry. Co. *v.* Zoffinger, 10 Bradw. 252, cited to support this position, does not apply. In that case the injured party abandoned the highway and went on the defendant's right of way for his own convenience only, while in this, if the deceased went on the company's ground, it was in an attempt to pass a car left obstructing the highway, in which endeavor he stepped into a hole between the ties, which threw him down, and he was run over.

Where one makes an excavation on his own ground, so near the highway as to endanger the safety of those passing along the street in the exercise of proper care, and leaves the same unguarded, by fence or other protection against accident, he is liable. Wood on Nuisance, page 262, sec. 273; Burge *v.* Gardiner, 19 Conn. 507; Vale *v.* Bliss et al., 50 Barb. 358; Bird *v.* Holbrook, 4 Bing. 628.

Where there is no direct evidence that the negligence of the defendant occasioned the injury, the facts and circumstances which the Supreme Court in several cases hold to be of sufficient proof (Illinois Central R. C. Co. *v.* Cragin, 71 Ill. 177; Chicago, Burlington & Quincy R. R. Co. *v.* Van Patten, 64 id. 510; and Chicago, Burlington & Quincy R. R. Co. *v.* Lee, 68 id. 577), were in this case ample to satisfy the mind that the injury was due to the defendant's neglect.

It is gross negligence to run a train without a brakeman, over a public highway. Chicago & Alton R. R. Co. *v.* Sullivan, 63 Ill. 293.

Running a dark train through a village is greater negligence than walking on the track. In this case the rear of the train—the end away from the engine—was perfectly dark and this dark end pushed across this most dangerous crossing. Indianapolis & St. Louis R. R. Co. *v.* Galbreath, 63 Ill. 436.

The law is settled beyond doubt that at a railroad crossing each party owes the other a duty to use all proper care to avoid accident. In a city like Peoria, at a crossing like that described, the railroad company must use the highest care to insure the public safety. Toledo, Wabash & Western Ry. Co. *v.* Miller, 76 Ill. 278; Chicago, Burlington & Quincy R. R. Co. *v.* Stumps, 69 id. 409.

SCHOLFIELD, J.—Action on the case, for negligence resulting in the death of the plaintiff's intestate. Verdict of jury, and judgment of court thereon for plaintiff. Appeal to Appellate Court for Second District, and judgment of that court affirming the judgment of the Circuit Court, and appeal from that judgment to this court.

The judgment of the Appellate Court relieving us of all questions of fact, we are only to look into the alleged errors of law. The intestate, an errand boy, on his way home at the close of the

day's labors, a little after dark, was struck while on a street, or on a cattle-guard by the side of a street, at a point where numerous railroad tracks and switches cross such street, by a moving car of defendant, and instantly killed. To show that the intestate was not observing due care at the time he received the fatal stroke from the car, the defendant, by its counsel, propounded to one of its witnesses the following question: "You may state whether or not you ever saw Fred (the deceased) get on, or attempt to get on, trains?" But, on objection, the court refused to permit the witness to answer the question. The counsel for the defendant then stated they proposed to prove by the witness under examination, and another witness named, that the deceased was in the habit of jumping on trains, but the court ruled that the evidence was inadmissible. No authority is referred to sanctioning the admission of such evidence, and we are not aware of any. Its effect is clearly to raise a collateral and immaterial issue. If such evidence is admissible to prove negligence on the part of the plaintiff's intestate, then the same character of evidence must be admissible to prove negligence on the part of the defendant, which has been condemned by the entire weight of judicial authority. In re Baltimore & Susquehanna R. R. Co. *v.* Woodruff, 4 Md. 242; Aldrich *v.* Pelham, 1 Gray, 510; Kidder *v.* Dunstable, 11 id. 342; Collins *v.* Dorchester, 6 Cush. 396; Gahahan *v.* B. & L. R. R. Co., 1 Allen, 187; Hubbard *v.* A. & K. R. R. Co., 39 Maine, 506; Parker *v.* Portland Publishing Co., 69 id. 173. We think the proposed evidence was properly excluded.

The second instruction, given at the instance of the plaintiff, is as follows:

"If the jury believe, from the evidence, that the crossing of the defendant's railroad on Sanger street was used by passers frequently between the hours of six and seven A.M. and P.M., and that the defendant knew it, and if they further believe that the defendant's servants and employees were switching and moving cars on said crossing between said hours, at a time when it was dark, by pushing them across said street, then it was the duty of the defendant to take some means to warn the passers, or to prevent accident to passers, and if the defendant did not do so, the defendant was guilty of negligence; and if such negligence was the cause, or the principal cause, of the death of Fred Clark, and if the jury also believe, from the evidence, that Fred Clark was not guilty of negligence which contributed to the injury, then the jury should find a verdict of guilty."

Counsel for defendant insist this is erroneous, because "while it charges the jury that the company was bound to take some means to warn passers over the street, it fails to state the duties which the law required of the passers." It does, however, imply that the intestate, in order that there be a recovery, should not

have been guilty of negligence which contributed to the injury,—which is stating the law more favorably for the defendant than, under the doctrine of comparative negligence recognized by this court, it is entitled to have it laid down. But there is no error in the instruction to the prejudice of the defendant,—no omission of any fundamental principle which it was entitled to have stated as an indispensable condition to a recovery. That definitions of what might or might not constitute negligence under claimed theories of proof, are not given, is unimportant. That which it is claimed is here omitted is suppletory in its character, and, if deemed necessary by the defendant, it should have presented it in a separate instruction.

An objection is urged to the third of the instructions given at the instance of the plaintiff, upon the ground that it assumes there were facts and circumstances shown, outside of the testimony of witnesses, competent for the consideration of the jury. This is not a fair construction of the instruction. It merely states, in effect, the law as applicable to circumstantial evidence, namely: If facts and circumstances are proved which lead the mind with certainty to the conclusion that other facts and circumstances are true, those facts and circumstances may be accepted and acted upon by the jury as true. 1 Greenleaf on Evidence (7th ed.), sec. 13, et seq.; Best on Evidence (1st Am. from 6 Lond. ed.), secs. 27, 294.

The fourth instruction, given at the instance of the plaintiff, is as follows:

"If the jury believe, from the evidence, that defendant started a train in the city of Peoria without ringing a bell or sounding a whistle, and if they further believe, from the evidence, that Fred Clark was attempting to cross the defendant's track on which said train was so started, and that by reason of there being no bell rung or whistle sounded, and such train or car of that train struck Fred Clark while so attempting to cross said track, then the defendant was guilty of culpable negligence; and if you further believe, from the evidence, that the death of said Clark was the result of such negligence on the part of defendant, and that said Clark was not guilty of negligence contributing to the injury, then you should find the defendant guilty."

Two objections are urged against this instruction by counsel for the defendant: First, it singles out and gives undue prominence to the question of the omission to ring the bell or sound the whistle; and second, in stating what constituted culpable negligence, and also in the use of the word "culpable." This instruction does not ignore the question of the contributory negligence of the intestate, but, as in the second instruction, by necessary implication states the rule in regard to his negligence more strongly against the plaintiff than our view of the law requires. The word "cul-

pable" is not objectionable in the sense in which it is here used,—that of "blamable." If the defendant was negligent, as contemplated, then it was certainly culpable,—i.e., "blamable." The question of the existence of the facts was left to the jury, and the jury were fully instructed as to the measure of the duty of the plaintiff's intestate, in instructions given at the instance of the defendant.

Some objection was taken, but seems not to be seriously pressed in argument, as to the refusal of the court to give certain instructions asked by the defendant. We perceive no error in that regard for which there should, in our opinion, be a reversal of the judgment.

The judgment is affirmed.

Judgment affirmed.

Comparative Negligence.—The doctrine of comparative negligence is one almost peculiar to the State of Illinois. It may briefly be set forth thus: In cases where the gist of the action is the negligence of the defendant, and contributory negligence on the part of the plaintiff is set up as a bar, if, on comparing the negligence of the plaintiff with that of defendant the former is found to have been slight and the latter gross, the plaintiff is entitled to recover. Galena, etc., R. Co. *v.* Jacobs, 20 Ill. 478; Chicago, etc., R. Co. *v.* Dewey, 26 Ill. 255; Coursen *v.* Ely, 37 Ill. 338; Chicago, etc., R. Co. *v.* Hogarth, 38 Ill. 370; Chicago, etc., R. R. Co. *v.* Tripplet, 38 Ill. 482; Illinois, etc., R. Co. *v.* Simmons, 38 Ill. 242; St. Louis, etc., R. Co. *v.* Todd, 36 Ill. 409; Ohio, etc., R. Co. *v.* Shanafelt, 47 Ill. 497; Chicago, etc., R. R. Co. *v.* Sweeney, 52 Ill. 325; Chicago, etc., R. R. Co. *v.* Gregory, 58 Ill. 272; Chicago, etc., R. Co. *v.* Dunn, 61 Ill. 385; Indianapolis, etc., R. Co. *v.* Stables, 62 Ill. 313; Chicago, etc., R. Co. *v.* Murray, 62 Ill. 326; Toledo, etc., R. Co. *v.* Spencer, 66 Ill. 528; Illinois, etc., R. R. Co. *v.* Moffit, 67 Ill. 431; Chicago, etc., R. Co. *v.* Van Patten, 64 Ill. 510; Rockford, etc., R. Co. *v.* Hillmer, 72 Ill. 235; Pittsburg, etc., R. R. Co. *v.* Knutson, 69 Ill. 103; Illinois, etc., R. Co. *v.* Cragin, 71 Ill. 877; Chicago, etc., R. Co. *v.* Lee, 68 Ill. 576; St. Louis, etc., R. Co. *v.* Manly, 58 Ill. 300; Chicago, etc., R. Co. *v.* Cass, 73 Ill. 394; Toledo, etc., R. Co. *v.* O'Connor, 77 Ill. 391; Schmidt *v.* Chicago, etc., R. Co., 83 Ill. 405; Illinois Central R. R. Co. *v.* Patterson, 94 Ill. 290; Hayward *v.* Morrill, 94 Ill. 349; Stratton *v.* Central City Horse Car Co., 95 Ill. 25; s. c., 1 Am. & Eng. R. Cas. 11; Chicago, etc., R. Co. *v.* Sykes, 96 Ill. 162; s. c., 2 Am. & Eng. R. R. Cas. 254; Chicago & N. W. R. Co. *v.* Dimick, 2 Am. & Eng. R. R. Cas. 201; Chicago, etc., R. Co. *v.* Johnson, 8 Am. & Eng. R. R. Cas. 225; Chicago & Alton R. R. Co. *v.* Bonifield, 8 Am. & Eng. R. R. Cas. 493.

O'Connor

v.

Boston and Lowell R. R. Corporation.

(135 *Massachusetts Reports*, 352.)

A railroad corporation constructed its tracks across a private way, which connected two public ways of a city, and over which there was much travel. At the crossing the corporation put up a sign, upon which was the following: "This is not a public way, and is dangerous." *Held*, in an action against the corporation, by a person injured at the crossing by being struck by a locomotive engine of the defendant, that the corporation was not entitled to a ruling, as matter of law, that this sign was a denial of the right of crossing, and that a person crossing did so at his own risk.

If, in an action against a railroad corporation for an injury sustained by being run over by a locomotive engine of the defendant, at a crossing of a private way at grade, the plaintiff relies upon the alleged negligence of the engineer of the locomotive, and also upon the want of a flagman, the defendant is not entitled to a ruling that, if the engineer used reasonable care, the plaintiff is not entitled to recover.

In an action against a railroad corporation, for an injury sustained at a crossing at grade, the defendant is not entitled to a ruling that the amount of care required of the railroad in using the crossing is the same that is required of the person who attempts to use the crossing, to avoid danger.

A boy about nine years old had in his charge, in a street of a city in the daytime, his brother, who was nearly five years of age. On approaching a place where the way crossed a railroad at grade, the younger boy, who was a short distance in advance, turned to see if his brother was coming, and, while walking backwards over the railroad, caught his foot between one of the rails and the planking which was laid between the rails, and, before he could extricate his foot, he was run over by a locomotive engine. At the time the boys began to cross the railroad, there were no indications of the approach of the engine. *Held*, in an action for the injuries sustained, against the corporation owning the railroad, that the question whether the boys and their parents were in the exercise of due care was one of fact for the jury.

Tort for personal injuries. Trial in the Superior Court, before Pitman, J., who allowed a bill of exceptions, in substance as follows:

About three hundred feet south of the Merrimac River, in the city of Lawrence, is the south canal of the Essex Co., about sixty feet wide, and immediately south of this canal is a private way about seventy feet wide, belonging to the same company, and known by the name of Merrimac Street. This way is considerably used by the public for travel, and connects two streets of the city. A branch of the defendant's railroad crosses the Merrimac River, and then on a curved line crosses the canal by an iron trestle bridge, and passes over this way at a level therewith. The defendant's location over the way was purchased by it of the Essex Co.; and, by a contract with the Essex Co., the defendant agreed to keep the

same in good condition, and that the Essex Co. and its grantees, owners of mill sites on the canals, should have the right to cross the location. At the time of the construction of the railroad, in 1879, the defendant placed planks between its tracks on this way.

The plaintiff's brother, called as a witness by the plaintiff, testified that on August 27, 1880, when he, the witness, was nearly nine years of age, and the plaintiff was four years and eleven months old, he and his brother were returning from North Lawrence, on foot, unaccompanied by any person; that they crossed the river, passed round the end of the canal, and started to cross the railroad track on Merrimac Street; that, as they were crossing the track, the plaintiff, who was walking ahead, turned round to see if the witness was coming, and, while walking backwards, stepped into the space between one of the rails of the defendant's railroad and the planking, left for the flange of the wheel of the locomotive engine; that the plaintiff was unable to withdraw his foot, and the witness attempted to pull it out, but was unable to do so; that he heard the whistle of an approaching train of cars coming from the northward, and, finding that he was unable to extricate his brother, he ran upon the canal bridge and endeavored to signal the train by outcries, and by waving his arms; that the engineer saw him and paid no attention to him; that he then returned to his brother, took hold of him, bent him over and held him down, so that he might lose his foot instead of his life; and that, while he so held him down, the train, which consisted of a locomotive engine and two cars, passed along and severed both of the plaintiff's feet. The length of the train was one hundred and sixty-two feet; and the train was stopped just as the rear car passed the plaintiff.

One Bailey testified, for the plaintiff, that, just before the accident, he was on the street south of the canal (which he had known as Merrimac Street for twenty-five years), about four hundred feet from the railroad crossing and going towards it, when his attention was attracted by hearing a boy scream; that he saw the older boy, who was screaming, run to his brother, whose foot was fast in the track, and try to get it out; that the older boy then ran on to the canal bridge, a few feet on, and waved a pail which he had in his hand, and hallooed; that he then ran back to his brother and bent him over, and the train came along and cut off both his feet. On cross-examination, the witness testified that he heard the whistle of the locomotive engine before he saw the boys; and that, when the train came in sight, the steam brakes were being applied.

The engineer testified, for the defendant, that, having blown the whistle and rung the bell, he was looking upon the track, and first came in sight of the boys as he approached the canal bridge; that he immediately gave several short whistles as a signal of danger; and, the children not leaving the track, he immediately applied the steam brakes, which were in perfect order, and reversed

his engine, bringing the train to a stand-still as quick as he could; that the speed of the train, as he approacked the bridge over the canal and saw the children, was about seven or eight miles an hour; that the older boy did not leave the younger one at all, and did not run towards the train, nor make any outcry or signal to him.

The planking at the crossing had remained in the same condition it was in when laid, down to the time of the accident. The defendant's witnesses testified that the planking was properly constructed and in good order; no witness testified that the planking was improperly constructed or out of order; but the plaintiff contended that the jury might, from the view which they took and the circumstances of the case, find that it was not properly constructed.

It was not contended that the train was, in any respect, out of order, or improperly manned, or that the proper signals were not given; but the plaintiff contended that the cross-examination of the engineer, a witness for the defendant, showed that he was not possessed of sufficient intelligence or capacity for the duties entrusted to him.

The defendant contended, on the evidence, that an intervening building prevented the place of the accident from being seen from the bridge crossing the Merrimac River at a point more than thirty feet from the southerly end thereof, a distance of about four hundred and seventy-five feet from the place of the accident; and that the trestles of the bridge across the canal also prevented the place of the accident being seen from the locomotive engine, until it had reached a point within a short distance of the canal bridge. The plaintiff denied this, and contended that the place of the accident could be seen at a much greater distance.

Upon the end of the canal bridge nearest the place of the accident, and in full view therefrom, was placed, at the time of the opening of the railroad, a sign adjoining and fronting said crossing, about four feet long and a foot wide, bearing this inscription: "This is not a public way, and is dangerous." The plaintiff contended that this notice referred to the bridge over the canal, on which were two railroad tracks, but neither sidewalk nor planking, and that it was intended to warn persons from crossing the bridge; and the defendants contended that the sign referred to the way; and this question was argued to the jury. The brother of the plaintiff testified that he saw and read this sign.

It was agreed that there was no gate or flagman at this crossing.

At the close of the evidence, the defendant requested the judge to order a verdict for the defendant. The judge declined so to do.

The defendant asked the judge to instruct the jury as follows: "1. If the plaintiff's walking backwards over the tracks at the place of the accident in any degree contributed to the accident, he was guilty of negligence, and cannot recover. 2. If the plaintiff in any respect was not in the exercise of reasonable care, and such

want of reasonable care in any degree contributed to the accident, the plaintiff cannot recover. 3. If permitting the plaintiff to go over the tracks by his parents was, under the circumstances, a want of reasonable care, and such want contributed to the accident, the plaintiff cannot recover. 4. If this crossing was built under the contract with the Essex Co., for their use, the railroad had the right, as against all others, to deny the right of crossing, and the conspicuous posting of a sign that 'this is not a public way, and is dangerous,' was such denial, and any persons using it after such notice did so at their own risk. 5. The only duty devolving upon the railroad or its servants, under any circumstances, as against the plaintiff, was to exercise reasonable care, and this reasonable care applies to the construction and maintenance of the crossing (if the judge shall rule, or the jury shall find, that, as against the plaintiff, it was bound to maintain the crossing at all), to the train and its appointments, to the train men and other servants employed, and to the conduct of such train men and servants; and if no want of such reasonable care on the part of the railroad caused the accident, the plaintiff cannot recover. 6. If the engineer was in the exercise of reasonable care in running the train, and, when he discovered the boys upon the track, he used reasonable endeavors to avoid the accident, and the failure to stop the train caused the accident, the plaintiff cannot recover. 7. If both the plaintiff and the defendant were in the exercise of reasonable care, the plaintiff cannot recover, or if both parties were wanting in reasonable care, the plaintiff cannot recover. 8. The amount of care required of the railroad in using the crossing, to avoid danger, is the same that is required of the person who attempts to use the crossing, to avoid danger. If extreme danger makes extreme care reasonable to the one party, it makes it equally so to the other."

The judge gave the second, third, fifth and seventh requests for instructions.

The judge declined to give the first request for instructions; and, on this point, instructed the jury as follows: "In the first place, you will consider whether the plaintiff was rightfully there. If he was too young to be there at all, he could not have been guilty of negligence. If he had no capacity to exercise care, if he was not of an age to be properly there, he cannot be said in law to be guilty of negligence. If he was properly there, and if his walking backwards was carelessness, taking into account his age, and that contributed to the accident, that would be within the general principle that the plaintiff's negligence would bar him of the right of action. But if he was of an age when he was not capable of exercising care, was not in law supposed to be properly there excepting under the guardianship of somebody, then the question would be whether negligence on the part of the person who had him in charge contributed to the accident. Then the question would be

whether this person knew what the plaintiff was doing, saw it, and had an opportunity of interfering with it; and also whether he was guilty of negligence in allowing the plaintiff to be without his immediate control, either by having him by the hand, or otherwise exercising efficient control over him."

In a subsequent part of his charge, the judge further instructed the jury upon this point as follows: "What is reasonable care depends, not only upon the circumstances to which I have alluded in regard to the boy and his age, but upon a variety of other circumstances; and one is the apparent danger, and the nature and power of the instrumentality used. Of course a person in walking must exercise a different degree of care when he is approaching danger from that which he exercises when he is walking in perfect safety; and the presence of danger imposes a different rule of care. How much that rule is modified by the youthfulness of a person, and the lack of that mature judgment which adult persons would have, is for you to say, under the rules I have given you. In estimating the degree of care which should be imposed, you will take into account the fact that there are young people who can be careless, as in cases, which perhaps have come within your own observation, of young children endeavoring to skip across a railroad track when an engine is coming, to see which shall be the last one to cross. Every one would understand that to be sheer carelessness. You will not destroy the rule which requires reasonable care on the part of every one; but, in considering the conduct of individuals, you may give proper consideration to the fact that persons are immature, or not of full age."

The judge declined to give the fourth request for instructions; and instructed the jury that, if the crossing was built under the contract with the Essex Co., the defendant had the right to deny crossing to all others not mentioned therein; that whether the sign was such denial depended upon a question of fact, as to what the sign applied to; that this was for the jury to determine; that, if it applied to the way, while it was a notice to the plaintiff that this was not a public way, and was in some sense dangerous, it was not, as matter of law, a denial of his right to pass; that, because a place is marked, "This is not a public way," it did not necessarily follow that everybody is prohibited from passing over it; that it was a question of fact how far the sign was to be taken as a notice that persons had not a right to pass; that, as the crossing was the private property of the defendant, the burden of proof was on the plaintiff to show, taking all the facts into consideration, the sign among them, that there was an implied license for all persons to pass over; that, if the plaintiff was a trespasser, the defendant would not be liable, except in case of wantonness or gross negligence on its part, of which there was no evidence. In regard to the implied license to the plaintiff to cross the tracks at this place,

and the duty of the defendant to protect him in so passing, the judge read to the jury, as a part of his ruling, the language of the court in Sweeny *v.* Old Colony & Newport R. R., 10 Allen, 368, 372.

The judge declined to give the sixth request for instructions; but instructed the jury, that, so far as the duty of the engineer was concerned, he would be bound to nothing but the exercise of reasonable care, and the defendant would not be responsible for anything else; that the right of the plaintiff to recover was not limited to the conduct of the engineer, because he based his right of action upon more than this ground; that, undoubtedly, the general rule was reasonable care under the circumstances.

The judge gave the seventh request for instructions to the jury, and further instructed them as follows: "Upon this question of reasonable care, something more ought to be said. The law uses the phrase 'reasonable care,' but it is an elastic phrase, not always meaning in its practicable application the same thing. In one sense, it is always 'reasonable care,' but, as applied to the conduct of persons, it means one thing at one time, and another thing at another time. In the matter which I am now upon, the law does not exact from children the same degree of watchfulness, judgment, foresight and coolness that it exacts from adults. It says that, if you find that either the child himself, or the child who has charge of him, is of suitable age to be where he is, if he has a right to be there at all, then he is only to be expected to exercise such care as could reasonably be expected of such children; of course you have first to settle the question whether either the plaintiff or the other boy was to be trusted there. In considering that, not only the age, but all you see of the boy's intelligence or otherwise, judge of him as you see him, and if you are of the opinion that he was a proper custodian of this boy, then the law expects such degree of care of him as would be reasonable for a boy of his age, situated as he was; and that test you will apply. That, again, is a practical question, to which you will apply your observation, experience and judgment in settling the matter."

The judge declined to give the eighth request for instructions; but instructed the jury that each party was bound to use reasonable care; and that it was for the jury to determine what was the care which was reasonable for either party, under all the circumstances of the case. The judge also further instructed the jury, on the question of reasonable care, as follows: "In guarding against accidents, it is only such accidents as can be reasonably foreseen and reasonably anticipated that ought to be reasonably guarded against, and that the railroad should provide against; and you will consider that, of course, in considering the question of care and caution. Several things are suggested that the railroad was neg-

ligent in, in this peculiar case, and, if you reach this part of the case, you ought to be able to find something, upon which you can put your finger, which you think was neglected. One suggestion is, that they ought to have a flagman at this place. The statutes provide, and it is of some importance in connection with this proposition, that the mayor and aldermen of a city or the selectmen of a town wherein a highway, town way, or travelled place is crossed by a railroad at the same level,—if of the opinion that it is necessary for the better security of the public that gates should be erected across such highway, town way, or travelled place, and that an agent be stationed to open and close such gates when an engine or train passes, or that bars be erected instead of gates, or that a flagman be stationed at the crossing who shall display a flag whenever an engine or a train passes,—may in writing request the corporation to erect and maintain gates, and station an agent thereat, or to erect bars, or to station a flagman at the crossing, and if it refuses or neglects so to do, may apply to the county commissioners. There are other provisions here that the county commissioners may make other orders, if they see fit. The counsel for the plaintiff contends (and it is correct as a proposition of law), that it is not conclusive, as matter of law, upon the obligation of the defendant to maintain a flag, that it has not been so directed. The fact that the public authorities have not called upon the defendant to do that is, however, a competent piece of evidence for you to consider. If, notwithstanding that, it was obvious to reasonable men that it ought to have been done, you may find that the railroad was negligent in not doing it. But you have a right to consider, upon that matter, that the persons who are charged with the duty by the statutes did not call upon the defendants, so far as we have learned in this case, and presumably not at all, to make any such provision. It has not been required to place any of these safe-guards about the crossing."

The jury returned a verdict for the plaintiff, in the sum of $10,000; and the defendant alleged exceptions.

J. H. George (of New Hampshire), and C. P. Thompson for the defendant.

S. B. Ives, Jr. for the plaintiff.

ALLEN, J.—1. The court properly declined to rule that the existence of the sign was conclusive that the plaintiff had no license to use the way and crossing; and the instruction to the jury upon this subject was correct.

2. The sixth prayer for instructions, if it referred only to the conduct of the engineer, was given. So far as it was intended to ask for a ruling that there was no evidence of negligence except that of the engineer, it was properly refused.

3. We see no error in the instructions of the court as to what

would constitute reasonable care in the one party or the other. The court properly refused to give the eighth prayer in the language in which it was expressed.

4. The principal question presented arises upon the rulings and instructions of the court in regard to the contributory negligence of the plaintiff.

The plaintiff was a boy less than five years of age, and was accompanied by his brother, who was nearly nine years of age. The place where the injury occurred was not a public highway, but was a way open for the public to use, and the jury must have found that the plaintiff was lawfully there. The question whether there was negligence in the parents of the plaintiff in allowing him to be there, attended as he was, was properly left to the jury. Mulligan *v.* Curtis, 100 Mass. 512; Ihl *v.* Forty-Second Street R. R. 47 N. Y. 317.

The further question was submitted to the jury, whether the plaintiff and his brother, as the person in whose immediate care he was, were in the exercise of due care in the manner in which he went upon the railroad crossing. The care required was that which would ordinarily be exercised under like circumstances, by boys of four and nine years of age. It is not a case in which the facts do not appear, and it cannot be known whether there was care or negligence, and therefore there is a failure to prove care, or the absence of negligence, as in Crafts *v.* Boston, 109 Mass. 519, and Hinckley *v.* Cape Cod R. R., 120 Mass. 257. The circumstances were in evidence, and the definite question was presented whether the evidence preponderated in favor of care or negligence. We think this question was properly submitted to the jury. Neither of the boys knew of the approaching train, and the negligence was not in respect of danger of collision with passing cars, or of direct personal injury from the condition of the crossing, but of stepping into an opening in the way, and thereby being caught and held, so as to be unable to escape from a train which should afterwards pass. How obvious the danger was depended, to some extent upon the condition of the crossing; and of that the jury had evidence, from their view of the premises, which the court could not have. Then the standard of care to be applied was not that by which conduct is ordinarily measured. It was not the care of a prudent man, but of a prudent boy, that was to be shown. There was no specific fact, such as violation of a law, or disregard of an established regulation, as in Wills *v.* Lynn & Boston R. R., 129 Mass. 351, which could give character to the act. It was a question whether there was negligence, under all the circumstances, in not observing and guarding against this particular danger, which was not the peculiar danger to which the attention is naturally directed at railroad crossings. Neither the fact that a hole in a road is known to a traveller of years of discretion, nor that it is plainly visible and would have

been seen by him had not his attention been directed elsewhere, is conclusive of negligence in him. Reed v. Northfield, 13 Pick. 94. In George v. Haverhill, 110 Mass. 506, 513, Mr. Justice Colt said: "It is all to be considered by the jury, but it is not required, as matter of law, that the thoughts of the traveller shall be at all times fixed upon those defects in the road he travels of which he may have knowledge."

Whether the plaintiff, in walking backwards that he might see his elder brother, in whose company he was, or the brother, in not observing the hole in the way and preventing the plaintiff from stepping into it, was exercising the care ordinarily shown by children of their ages, was peculiarly a question to be determined by the judgment of the jury upon the facts proved by the evidence. Gaynor v. Old Colony & Newport Ry. 100 Mass. 208; Smith v. Westfield National Bank, 99 Mass. 605; Mayo v. Boston & Maine R. R., 104 Mass. 137; Lane v. Atlantic Works, 111 Mass. 136; Treat v. Boston & Lowell R. R., 131 Mass. 371; s. c., 3 Am. & Eng. R. R. Cas. 423; Fleck v. Union Ry., 134 Mass. 480; Railroad v. Stout, 17 Wall. 657, 663.

Exceptions overruled.

LEHNERTZ
v.
MINNEAPOLIS AND ST. LOUIS RY. CO.

(*Advance Case, Minnesota. November* 17, 1883.)

In an action against a railroad company to recover damages for injuries at a highway crossing an allegation in the complaint that the railroad was so located and constructed at said crossing that a train or engine could not be seen by a person on the highway until so near that it was difficult, or impossible, to avoid being struck, and that it was negligent thus to locate and construct it, is sufficiently certain.

Where substantial rights are not affected, the decision of the court below, on a motion to make more definite and certain, will not be reversed.

APPEAL from an order of the District Court, Carver County.

Henry Hinds & Henry Hinds, Jr. for respondent.

H. J. Peck for appellant.

GILFILLAN, C. J.—The first portion of the complaint, which defendant's motion asked to have made more definite and certain, is hardly obnoxious to the charge of uncertainty. Taken together it amounts to this: that at the highway crossing mentioned the railroad was so located and constructed that a train or engine approaching thereon cannot be seen by a person on the highway until

so near that it is difficult or impossible to avoid being struck, etc.; and that it was negligent in the defendant to so locate and construct it.

In the second part asked to be struck out, the pleader, if he was trying to make his precise meaning obscure, achieved tolerable success; but it is difficult to see how the defendant could be prejudiced by it, unless in being compelled to read very carefully, and perhaps repeatedly, the jumble of words used in order to ascertain the charges made against it. Upon a careful study of the complaint, two are apparent: one (and the same is in the third part of the complaint assailed), that at the crossing the railroad was insufficiently constructed, in bad order, in ruinous condition, difficult, unsafe, and dangerous for teams and vehicles to cross; the other, that it was negligent in the manner of running an engine and train of cars across the highway with great velocity and without warning of its approach. Nothing more definite or indefinite can be made out of those parts of the complaint. Certainly it is easy for defendant to be prepared to show how its road was located and constructed at the point in question; whether it was at the time in good condition or not, and whether, on the occasion mentioned, the train was running in a careful manner; and the complaint apprises it, awkwardly it is true, that it must be prepared to meet evidence from the plaintiff as to those points. The substantial rights of defendant on the merits were not affected by the decision of the court below, and where such is the case its exercise of discretion in granting or refusing such a motion will not be reversed by this court. Madden *v.* Minneapolis & St. L. Ry. Co., 30 Minn. 453; s. c., 3 Am. & Eng. R. R. Cas. 232.

Order affirmed.

Lake Erie and Western Ry. Co.

v.

Zoffinger.

(*Advance Case, Illinois.* 1883.)

Where there is a direct conflict of the testimony on almost all the material facts, in an action on the case to recover for a personal injury caused by negligence, a finding by the jury for the plaintiff implies a finding of every fact the evidence tends to establish in favor of the plaintiff necessary to sustain the action; and when the Appellate Court finds the facts the same way by affirming the judgment, such finding is conclusive on this court.

In an action on the case against the railway company, to recover for a personal injury alleged to have resulted from the negligence of defendant, where there was evidence tending to show that the plaintiff was struck by cars be-

ing moved by defendant at a street crossing; that the train was being run at an unusual rate of speed; that no bell was rung or whistle sounded; that there was no light on the forward car that struck the plaintiff, and that plaintiff was observing due care for his safety, it was *held*, that such facts, assuming them to have been proven, established a clear right of recovery in the plaintiff.

The admission of improper evidence of a trifling character not affecting in the slightest degree the defence set up, affords no ground for reversing a judgment in favor of the plaintiff fully justified by the other facts found by the jury.

In an action to recover for a personal injury by being struck by a moving car at a street crossing, the defence was a want of due care by the plaintiff, and that he was intoxicated. The defence offered to prove that just before the accident the plaintiff, in a saloon, called for a drink of liquor and that the barkeeper told him he had enough, which the court excluded, on objection: *Held*, that the evidence was not admissible, and was properly refused. The fact whether plaintiff was under the influence of liquor was subject to proof the same as any other fact in the case, but could not be proved by the declaration of a third person.

THIS was an action on the case brought by appellee apainst the appellant in the McLean Circuit Court, where a trial was had resulting in a verdict and judgment in favor of the plaintiff for $3500 and costs. On the trial the defendant sought to show that the plaintiff was intoxicated at the time he was injured, which the plaintiff denied. The defendant called a Mr. Lancaster as a witness, by whom it expected to prove that plaintiff was intoxicated, by relating what conversation he heard in a saloon, but the court sustained an objection to the question. The other material facts appear in the opinion.

Lucas, Weldon, & McNulta for appellant.

"The burden of proving that he exercised ordinary care was on the appellee. Dyer *v.* Talcot, 16 Ill. 300; Chicago, Burlington & Quincy R. R. Co. *v.* Hazard, 26 Ill. 377; C., B. & Q. R. R. Co. *v.* Damerell, 81 Id. 454; Kiperly *v.* Ramsden, 83 Id. 355; I. & St. L. R. R. *v.* Evans, 88 Id. 63; President, etc., *v.* Carter, 2 Bradw. 34; Chic. City Ry. Co. *v.* Lewis, 3 Id. 245.

Declarations of a third party to plaintiff about a matter material to the issue are competent evidence. Wharton on Ev. (2d ed.), sec. 1136; Jewett *v.* Banning, 23 Barb. 15; McClerhan *v.* McMillan, 6 Pa. St. 366.

The negligence complained of must have caused the injury. Chic. R. I. R. R. Co. *v.* McKeon, 40 Ill. 218; Chic., B. & Q. R. R. Co. *v.* Lee, Admr., 60 Id. 504; C., B. & Q. R. R. *v.* Van Patton, 64 Id. 515; C., B. &. Q. R. R. Co. *v.* Lee, Admr., 68 Id. 583.

If appellee failed to exercise ordinary care, he cannot recover. Dyer *v.* Talcot, 16 Ill. 300; 20 Id. 478; 72 Id. 388; 76 Id. 26; 80 Id. 90; 81 Id. 24; 83 Id. 357; 88 Id. 64; 90 Id. 587; 93 Id. 294.

The law is, unless appellee was struck at the street crossing he

cannot recover. 83 Id. 510; 71 Id. 500; 10 Brandw. 252; 47 Ind. 43; 59 Pa. St. 129; 12 Harr. 465; 81 Pa. St. 366.

Reed, Fifer & Philips for appellee.

The declaration of the barkeeper was clearly incompetent to prove the fact sought to be shown thereby. 1 Greenleaf on Ev., sec. 199; Child *v.* Grace, 2 Carr. & Payne, 193; Commonwealth *v.* Kinney, 12 Metc. 235.

The negligence alleged was, first, there was no light on the west end of the train at the time it crossed Howard Street; second, the bell was not rung; third, the train when approaching, was run at a high rate of speed; and fourth, there was no person on the west end of the train to watch the track or give warning of danger. The jury must have found some of these allegations of carelessness were proven, and if so, the recovery was rightful.

This case has been tried three times, each and every trial resulting in a verdict for the plaintiff.

Per Curiam.—This action was brought by John Zoffinger against the Lake Erie & Western Ry. Co., to recover for personal injuries sustained by plaintiff, caused by a train of cars defendant was moving over the track of the Indianapolis, Bloomington & Western Ry., in the city of Bloomington. On the trial plaintiff recovered a judgment for $3500, on which the Circuit Court rendered judgment against defendant. That judgment was affirmed on appeal to the Appellate Court, and defendant brings the case to this court on its further appeal.

After a careful consideration of the entire record, no tangible ground is perceived on which reversal of the judgment in this case can be based. There was a direct conflict in the testimony touching almost every material fact in the case; but the jury found the issues in favor of the plaintiff, and that implies a finding of every fact the evidence tends to establish in favor of plaintiff that was necessary to sustain the action. The Appellate Court by its judgment of affirmance, having found the facts the same way, its findings are, of course, conclusive on this court, under the statute.

There is evidence tending to show plaintiff was struck by the cars being moved by defendant at or on the crossing at Howard Street; that the train was being run at an unusual rate of speed; that no bell was rung or whistle sounded; that there was no light on the forward car that struck plaintiff, and that plaintiff was observing due care for his safety. As there was some evidence tending to establish these facts the jury must have so found, and the affirmance of the judgment in the Appellate Court implies a finding of the facts the same way. Conceding the facts to be as they must have been found, a clear case is made in favor of plaintiff, where a recovery is fully justifiable.

The evidence admitted, which it is insisted was improperly al-

lowed, is of too trifling a character to be made the ground of a reversal of a judgment where the facts are as the jury must have found them. It could not in the slightest degree affect the defence sought to be made, and defendant was not in the least prejudiced by its admission. There was no error in excluding what the barkeeper may have said to plaintiff when he called for something to drink at his counter. No principle is suggested on which such declarations are admissible. All that was sought to be proved was, whether plaintiff was then under the influence of intoxicants. The remark made by the witness was not proper to show that fact. If that was his condition, it was subject to proof as other facts in the case. What the witness said to him was not proper to show his condition.

But two instructions were given for plaintiff; neither of them contains any bad law. So far as they assume to state the law, it is formulated with sufficient accuracy. On the other hand, a great number of instructions—fifteen in all—were given for plaintiff, which state every conceivable principle of law defendant deemed applicable to the facts of the case. There can be no just ground for complaint on account of instructions given at the trial. Indeed, the charges given were very favorable to the defence defendant was endeavoring to make.

Judgment affirmed.

Backing and Pushing Cars.—As to the duty required on the part of a railroad company in backing or pushing cars at or near a crossing, see Bailey v. New Haven, etc., R. Co., 107 Mass. 496; Leavenworth, etc., R. R. Co. v. Rice, 10 Kans. 426; Hathaway v. Toledo, etc., R. R. Co., 46 Ind. 25; Kennedy v. North Mo. R. R. Co., 36 Mo. 351; Grippen v. New York, etc., R. R. Co., 40 N. Y. 34; Bradley. v Boston, etc., R. R. Co., 2 Cush. 537; Shaw v. Boston, etc., R. Co., 8 Gray, 45; Rohan v. Milwaukee, L. S. & W. Ry. Co., infra· Hogan v. Chicago, M. & St. P. R. Co., supra.

BOHAN

v.

MILWAUKEE, L. S. AND W. RY. CO.

(*Advance Case, Wisconsin. May* 31, 1883.)

A. while crossing a railroad track at night by a public crossing was struck by a train of gravel cars which were being pushed in front of the locomotive. There was no light on the foremost car but there was a strong head-light on the locomotive. A. testified that before starting to cross he looked up and down the track but did not see the train nor the head-light of the locomotive. In an action by him against the railroad company to recover dam-

ages for his injuries: *Held*, that it was error to grant a nonsuit, the questions of negligence and contributory negligence being properly for the jury.

APPEAL from Circuit Court, Ozaukee County.

Action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant company. The railway of the defendant from Milwaukee passes north through the west portion of the city of Port Washington, crossing a highway leading into the city from the west. The depot of the company in Port Washington is located on the east side of the railway a short distance north of the highway, and the depot platform extends south to the highway. On the evening of June 5, 1882, the plaintiff, who resides west of the railway and street crossing, started from the city for his home. When he reached the crossing, he went upon the depot platform, and remained there a short time conversing with some friends. He then left for home, and when crossing the west rail of the track was struck and injured by a gravel car, which was, with two others, being pushed by the locomotive attached to a regular train from the south, then due at the depot. This happened about 10 o'clock in the evening, and is the injury complained of. The three gravel cars occupied a space of over 100 feet on the track ahead of the locomotive. The plaintiff testified that as he was about to cross the track he looked south and saw the head-light of the locomotive, which he thought was about at a switch, admitted to be at least 200 feet south of the point where plaintiff was struck. He further testified that he saw nothing on the track ahead of the locomotive. Several other witnesses testified that they each saw the head-light of the approaching train, but neither of them saw the gravel cars ahead of the locomotive until the moment the plaintiff was struck. These were platform cars, and the testimony tends to show that they had gravel upon them, but no light or other signal of their presence there. On the above testimony the circuit judge nonsuited the plaintiff, but subsequently, at the same term, made an order setting aside the nonsuit and granting a new trial. From such order the defendant company appeals.

George W. Foster for respondent, Frank J. Bohan, by guardian.

Alfred L. Cary and Bradley G. Schley for appellant, Milwaukee, L. S. & W. Ry. Co.

LYON, J.—We agree with the learned counsel for the defendant that no question of judicial discretion is here involved. The only question presented by this appeal is, was or was not the nonsuit properly granted? If it was, the order setting it aside and granting a new trial is erroneous and should be reversed; if it was not, the order should be affirmed. Unless it was conclusively proved, either that the defendant was not guilty of any negligence which caused the injury complained of, or that the plaintiff himself was

guilty of negligence which contributed thereto, the nonsuit should not have been ordered. The question to be determined is, were either of these propositions so established?

On the one hand, the failure of the defendant to place a light upon the forward gravel car, to indicate the presence of the gravel cars ahead of the locomotive, is alleged as negligence of the defendant. On the other hand, it is claimed that the head-light of the locomotive rendered those cars visible to persons at the street crossing, and that had the plaintiff used proper care when he saw the head-light, he would have seen the gravel cars in advance of the locomotive. Had the locomotive been at the head of the moving train, it will scarcely be claimed that the plaintiff was negligent in attempting to cross the track before it, for the proof shows that he had ample time in which to cross before the locomotive reached the crossing. At least, it could not be held as a proposition of law that his attempt to cross the track was negligence. It would be for the jury to say whether it was or not. Had the plaintiff known that over 100 feet of the track in advance of the approaching locomotive was occupied by the gravel cars, it seems clear that he would have been chargeable with negligence in attempting to cross the track ahead of the moving train; especially so when there is no pretense of the existence of any emergency which required him to cross before the train passed or stopped. If by the exercise of proper care and scrutiny the plaintiff would or might have seen the gravel cars, his failure to discover them was, in the like manner, neligence. If the plaintiff is chargeable with negligence because he failed to see the gravel cars, he is so because the head-light sufficiently disclosed their presence. It is not in proof that cars are usually propelled in advance of regular trains,—presumably they are not, especially in the night-time,—and no means other than the head-light suggested by which the plaintiff might have informed himself that such cars preceded the locomotive.

On the other hand, it is not unlawful for railway companies to propel cars by pushing them in advance of the locomotive by which they are propelled when the exigencies of their business require it to be done. If they do so under circumstances which increase the risks of injury to persons or property, the law places them under obligation to give timely and suitable notice or warning, in some manner, of what they are doing. In this case it does not appear that the gravel cars could be distinguished or their presence discovered by persons at the street crossing, when the plaintiff attempted to cross the track, unless by aid of the head-light. If, therefore, the head-light did not disclose to persons at that point, using proper care and watchfulness, that the locomotive was preceded by the gravel cars, the defendant company was negligent in not furnishing some other and more effectual signal or notice of the fact. Hence, the case seems to turn upon the question of the suf-

ficiency of the head-light to enable the plaintiff to discover the gravel cars by exercising due care and scrutiny. If it was sufficient, the plaintiff was negligent and the defendant was not. If it was not sufficient, the result is reversed—the defendant was negligent and the plaintiff was not.

All of the witnesses who testify on the subject say that they saw the head-light of the locomotive, but did not see the gravel cars which preceded it until the moment the plaintiff was struck. The gravel upon the cars probably gave to them, to some extent, the color or appearance of the road-bed; and this might have interfered with seeing the cars from the crossing readily. Besides, it is testified that the glare of the light had a tendency to obscure the vision of persons at that point. There was no structure upon the platform of the cars to arrest observation. There is no evidence of the height of the head-light from the ground or from the top of the gravel on the cars. We merely know from the evidence that there was a head-light on the locomotive plainly visible from the crossing, and that all of the witnesses who testify they saw it when the train was approaching the crossing, state that they did not see the gravel cars.

We fail to find in this testimony, or in any of the testimony, anything which will authorize us to hold it conclusively proved that the head-light was sufficient to enable the plaintiff, had he exercised reasonable and proper care and scrutiny, to see the gravel cars and thus become aware of the peril of crossing the track when he attempted to do so. Whether the head-light was sufficient for that purpose is a question, the answer to which must depend largely upon the inference which may properly be drawn from a variety of facts and circumstances constituting the res gestæ. The questions are, really, did the negligence of the defendant cause, or that of the plaintiff contribute to, the injury complained of? and from their very nature can only be answered by drawing the proper inferences from established facts. To do this is peculiarly the function of the jury. This is the doctrine of Langhoff, adm'r, *v.* M. & P. du C. Ry. Co., 19 Wis. 489, and is believed to be the doctrine of all the cases in this court which involve the question.

It follows that the nonsuit was improperly ordered, and that the circuit court properly vacated it and ordered a new trial.

Order affirmed.

Orton, J., dissenting.—I most respectfully dissent from the opinion in this case.

1. The boy had no business with the company, or at its depot, or on its platform, and was there only as an idle spectator "or for fun," waiting to see the train come in, then to pass over the road towards his home.

2. The company owed no duty to the boy more than to any one

passing over its road on his own business, at or near its depot or anywhere else on its line.

3. They were not bound to carry a light on the forward end of the gravel car—they were engaged in switching near the depot—so far as this boy was concerned, and it was not negligence that they did not do so. Suppose this train and locomotive were pushing platform cars in front from one depot to another, and in the open country, distant from each, a man living in the vicinity attempted to "beat" the train when the head-light of the engine was within less than 100 feet of him, and to cross over, and he did not see the flat cars in front, and is struck by the forward one when he had taken one step on the track, as in this case, and was injured, would the law hold the company negligent in not carrying a light on the forward platform car? I think not. If a person attempts to cross the track under such circumstances he does so at his own risk. The company could not anticipate, and is not bound to expect, any such foolhardy attempt. This accident having happened at or near the depot does not make the case different from the one supposed, for the boy had no connection with the depot or its uses. To impose the duty on the company in respect to anybody and everybody to carry a light on the car being thus pushed for a mere temporary purpose, would make it its duty in all cases of switching of cars to always have a light upon the car pushed ahead of the engine. Can it be said that a head-light does not throw its rays 100 feet in front, so as to render such a light necessary, and that the law, therefore, makes the absence of one negligence? This case cannot rest upon the negligence of the company in this respect, and this is the only respect in which it is claimed.

4. The boy was grossly negligent and careless: (1) In attempting to cross the track before an approaching train, even though the engine was at that moment nearly 100 feet distant. It will not do to encourage such a dangerous and adventurous experiment by holding that it was not carelessness. Can it be said, or ought it to be said, that such an act was common prudence? And yet we have to say so by holding that it was not the want of it. Boys are too apt to take such dangerous chances to be encouraged by legal sanction. The fact that this boy might have safely crossed the track in this instance if the gravel cars had not been in front, is not the test of common prudence, or the want of it. We do not know whether he could have safely crossed or not. He might have fallen or his foot might have been caught in a frog, which is very common, or in some other narrow place, or some other cause might have intervened while thus running hastily to escape the train. (2) The boy could have seen the forward end of the car had he looked. He testified that he did not see it because he was looking at the head-light. It is not possible that an engine head-light does not throw its light over and beyond three flat cars in

front, of considerably less than 100 feet of distance, so that they could not be easily and readily observed by one "looking before leaping" in front of the same. The car caught the boy about his second step, and had he looked down before he jumped down from the platform of the depot, directly on the track, he must have seen it. Heidkamp, a witness for the plaintiff, testified that the boy was standing talking with him just before he stepped down from the platform, and that he was still standing near the edge of the platform when the car struck the boy, and that he saw it strike him. He said he saw it when he looked, but before, he had been looking at the head-light, and did not see the car. He testified: "I know he was crossing the west rail, because he only had one more step to go, and he was trying to take that step when he was struck. I seen his legs over the west rail, because they were slung up in this manner [indicating]. It was light enough to see him, because I watched him when he went over. I had my eyes on him. I guess it was the head-light that lit it up; that was the only light around there. The head-light lit it up so I could see him." This was the most competent witness in the case, and had the best means of knowing the facts. The jury ought not to find against his testimony even if they should be so inclined. This evidence is conclusive that the boy could and would have seen the car almost directly before him had he looked to see where he was jumping, or in that direction. All cases agree that the party must look, and not looking is negligence. Here, too, we have positive evidence that the head-light of the engine did throw its light beyond the forward end of the car which struck the boy, and that that end of the car was seen by one standing in almost the exact place from which the boy jumped. Against this positive evidence all speculation or supposition as to whether the head-light could light up the place so as to be seen, are out of place and weigh nothing.

I speak of the plaintiff as "the boy," but he was 20 years old, and of full judgment and capacity. He was certainly reckless and negligent, and ought not to recover. I think there have been many cases in this court where the plaintiff was less negligent, and yet was not allowed to recover. I think the circuit court should not have set aside the nonsuit. The first impression of the learned judge was, in my opinion, correct. On the evidence given, the jury would not be justified in rendering a verdict for the plaintiff, and if they should do so it would be the duty of the court to set it aside.

Pushing and Backing Train.—Where a train is pushed by a locomotive over a street crossing or is backed over such crossing, the law requires extraordinary care on the part of the company to avoid an injury. Bailey *v.* New Haven, etc., R. Co., 107 Mass. 496; Leavenworth, etc., R. R. Co. *v.* Rice, 10 Kas. 426; Hathaway *v.* Toledo, etc., R. Co., 46 Ind. 25; Kennedy *v.* North Missouri R. Co., 36 Mo. 351; Grippen *v.* N. Y., etc., R. Co., 40 N.

Y. 34; Bradley v. Boston, etc., R. R. Co., 2 Cush. 539; Shaw v. Boston, etc., R. Co., 8 Gray, 45; Lake Erie & W. R. Co. v. Zoffinger, supra; Hogan v. Chicago, M. & St. P. R. Co., supra.

CANTY
v.
LATTERNAR et al.

(*Advance Case, Minnesota. November* 24, 1883.)

A complaint which states facts constituting a cause of action of either a legal or an equitable nature, is not demurrable because framed with a view to relief of another kind than that to which the facts show the plaintiff to be entitled. By contract between a plaintiff in an action and his attorney therein, the former agreed to pay the latter for his services a certain sum if he won the cause, and nothing if he failed to do so. The contract contained this further stipulation respecting the agreed compensation: "I hereby agree that he (the attorney) shall receive said money from the Minneapolis & St. Louis R. R. out of the amount due me from said railroad company for running through my land, to be paid when said suit is settled." *Held*, that the agreement was not champertous nor illegal.

The contract construed as an equitable assignment of the portion of the chose in action referred to, entitling the attorney to receive the same specifically, the condition respecting payment having been fulfilled.

The railroad company having, before the contract was made, but without the knowledge of the parties, deposited in court the amount of the debt referred to, pursuant to statute, it is considered that the attorney had a right by force of the contract, and without a reformation of it, to recover out of the fund in court the stipulated sum.

A husband, a part of whose homestead is taken under the law of eminent domain, may dispose of the compensation awarded to him therefor without the consent of his wife.

APPEAL from an order of the District Court, Hennepin County.

R. H. Day and D. B. Johnson for appellant.

Merrick & Merrick for respondent.

DICKINSON, J.—The demurrer rests alone upon the ground that the complaint does not state facts sufficient to constitute a cause of action. It is urged in support of the demurrer that this action cannot be sustained because it is in its nature equitable, while an adequate remedy of a legal kind is open to the plaintiff. This is no sufficient ground for a demurrer. The action cannot be dismissed, nor is the complaint demurrable, if facts are alleged which constitute a cause of action of either a legal or equitable nature. Upon such facts, admitted, as by demurrer, or proven upon trial, the court, which exercises both legal and equitable jurisdiction, will award the proper relief. Conner v. Bd. Ed. St. Anthony, 10 Minn. 439 (Gil. 352); Metzner v. Baldwin, 11 Minn. 150 (Gil.

92); First Div. St. P. & P. R. Co. *v.* Rice, 25 Minn. 278; Wright *v.* Wright, 54 N. Y. 437; Leonard *v.* Ragan, 20 Wis. 540; White *v.* Lyons, 42 Cal. 279.

The parties were not restrained by any existing rule of law from agreeing upon the measure and mode of the plaintiff's compensation. The contract was authorized by statute (Gen. St. 1878, c. 67, § 1), and was not champertous nor illegal. No other substantial reason is suggested as opposing a right on the part of the plaintiff to recovery, either from the specific fund in court or from the defendant Latternar, personally, and he being entitled to one or the other of these remedies, the demurrer cannot be sustained. We will consider some other questions relating to the construction and effect of the written contract recited in the complaint which were argued before us, and which are claimed to have been passed upon in the decision of the court below.

Did the contract constitute an assignment of the fund in question entitling the plaintiff to a specific recovery of it? The doctrine has generally prevailed, at least in courts of law, that an assignment or order for payment of a part only of an entire chose in action is not effective to give a right of recovery against the debtor in the absence of assent on his part to the transaction. Since choses in action became legally assignable, the only reason remaining for the rule is that which regards the rights of the debtor, namely, that he may not without his consent be subjected to several actions, or compelled to respond to several demands, his obligations being originally single and entire. The rule extends not beyond the reason for it; and, as between the parties to the transaction, an assignment of a part of an entire demand is binding and enforceable. In this case the railroad company had discharged its obligation by paying the money into court pursuant to statute, and only the parties to the contract are interested in the contract or its enforcement. They are bound by it. Upon its face the contract is to be construed as an equitable assignment of $100 of the amount there referred to as due the respondent from the railroad company. It expressed not merely an obligation to pay upon the contingency named, nor merely to pay out of money to be collected by the respondent, but that the plaintiff should receive this money from the railroad company out of the amount owing by it to the respondent. It was in effect a constructive appropriation in favor of the plaintiff of so much of the money payable to the respondent, subject only to the condition named, and was hence operative as an assignment, although not an assignment in form. Crone *v.* Braun, 23 Minn. 239; 2 Lead. Cas. in Eq. (White & Tudor's Notes) 1644. A distinction exists between such a case and an agreement that the promisor will pay out of a particular fund. In the latter case the agreement contemplates a continued right in the promisor to recover and to hold the money, and that payment shall be made only through him.

The fact that by the terms of the contract the plaintiff's right to recover the money was contingent upon a successful termination of the action does not forbid that the contract be treated and enforced as an assignment, since the specified event has occurred, and the plaintiff's right thereby became absolute.

The fact that the railroad company had, before the making of the contract, deposited the money in court to be paid to the person entitled to receive it, as it might do under the statute, and thereby discharge itself from further liability, and that the instrument was framed in ignorance of this fact, does not change the legal effect of the written agreement as an equitable assignment of the fund, nor render necessary a reformation of the contract in order that it may express the real intention of the parties. The right of the plaintiff in respect to the fund in question may be stated in the two propositions, that under the contract and by a construction of its terms he was entitled (the condition being fulfilled) to receive from the railroad company the money owing to the respondent, and that that money so owing and the fund in court are identical. The statute which forbids the alienation of the homestead of the husband without the consent of the wife, does not affect his right to dispose of the money awarded to him as compensation for a taking of any part of the land under the law of eminent domain.

The order sustaining the demurrer is reversed.

Illegal Contracts with Attorneys.—An assignment of part of a suit in claim by a client to his attorney as compensation for his services has been much attacked and is in some cases deemed contrary to public policy and pronounced void. Such assignments are even more open to objection than contingent fees. Arden *v.* Patterson, 5 John's Ch. 48; Bleakley's Case, 5 Paige, 311; Wallis *v.* Loubat, 2 Denio, 607; Thurston *v.* Perceval, 1 Pick. 415; Rust *v.* Larue, 4 Litt. 411; Caldwell's Admrs. *v.* Shepherd's Heirs, 6 Mon. 391; Elliott *v.* McClelland, 17 Ala. 206; Backus *v.* Byron, 4 Mich. 535; West *v.* Raymond, 21 Ind. 305; Low *v.* Hutchinson, 37 Me. 196; Scobey *v.* Ross, 13 Ind. 117; Merrit *v.* Lambert, 10 Paige, 352; Lathrop *v.* Amherst Bank, 9 Metc. 481; Lafferty *v.* Jelley, 22 Ind. 471; Davis *v.* Shanon, 16 B. Monr. 67; Key *v.* Vattier, 1 Ohio, 132; Dumas *v.* Smith, 17 Ala. 305; Jenkins *v.* Bradford, 59 Ala. 400; Greenman *v.* Cohee, 61 Ind. 201; Hayney *v.* Coyne, 10 Heisk. 339; Orr *v.* Tanner, 12 R. I. 94; Ackert *v.* Baker, 131 Mass. 436; Taylor *v.* Hinton, 66 Ga. 743; Million *v.* Ohnsorg, 10 Mo. App. 432; Atchison, T. & S. F. R. Co. *v.* Johnson, 11 Am. & Eng. R. R. Cas. 1.

Legal Contracts.—But such contracts, though commonly censured, are in many cases admitted to be valid and binding contracts. Newkirk *v.* Cone, 18 Ill. 449; Bayard *v.* McLane, 3 Harr. 216; Thallhimer *v.* Brinkerhoff, 3 Cowen, 643; Ramsey's Devisees *v.* Trent, 10 B. Monr. 336; Wright *v.* Meek, 3 Iowa, 472; Lytle *v.* State, 17 Ark. 608; Ex parte Plitt, 2 Wall. Jr. 452; Patten *v.* Wilson, 34 Pa. St. 299; Wylie *v.* Coxe, 15 How. 415; Schomp *v.* Shenck, 40 N. J. L. 95; Cross *v.* Bloomer, 6 Baxt. 74; Taylor *v.* Hinton, 66 Ga. 743.

Evidence.—All such contracts, however, being not looked upon with favor must be clearly established by proof. The law will not raise an implication that they exist from the circumstances or from doubtful usage. Ford *v.* Harrington, 16 N. Y. 255; Valentine *v.* Stewart, 15 Cal. 387; Mills *v.* Mills,

26 Conn. 213; Evans *v.* Ellis, 5 Denio, 640; Lewis *v.* J. A., 4 Edw. Ch. 599; Jennings *v.* McConnell, 17 Ill. 148.

Other Matters.—The assignment of part of a judgment to an attorney is not invalidated by the fact that the contract on which the assignment is founded is champertous. Ross *v.* Chicago, etc., R. R. Co., 55 Iowa, 691. It is no defence to an action that the plaintiff has entered into a champertous contract for its prosecution. Small *v.* Chicago, R. I. & P. R. Co., 55 Iowa, 582.

LAMONT

v.

WASHINGTON AND GEORGETOWN R. R. CO.

(*Advance Case, District of Columbia. October* 15, 1883.)

Before judgment, the parties to a pending suit may settle it between themselves without considering either the wishes or the interest of the attorneys.

Plaintiff brought an action of tort to recover damages for injuries received. Pending the suit, plaintiff and defendant, without the knowledge of plaintiff's attorneys, settled the case. Plaintiff then gave defendant an order on the clerk of the court to dismiss the suit, which being filed, plaintiff's attorneys moved the court to set the cause down for trial notwithstanding, on the ground that the settlement was collusive, and was made with knowledge on the part of the defendant that the plaintiff's attorneys were interested in the case to the extent of their fees for services. An affidavit accompanied the motion showing that the plaintiff had agreed to pay his attorney a contingent fee of thirty-three per cent of the amount that should be recovered. The court thereupon passed an order that defendant should pay to plaintiff's attorneys one third of the sum for which the case had been settled, and in default thereof the entry of dismissal should be struck out and the cause set down for trial. On appeal this court reversed the order, holding:

That the court will not interfere to enforce in a summary way through the original suit, the collateral engagement of a client for the compensation of his attorney, but will leave the latter to his common law remedy.

Whether the order of the court below was an appealable order, *quære.*

THE case is stated in the opinion.

Henkle, McPherson & Hine for plaintiff.

Davidge & Totten for defendant.

Cox, J.—This case, as is very well known, was an action brought to recover damages, for injuries alleged to have been suffered by the plaintiff in being forcibly and wrongfully expelled from the cars of the defendant.

The case was tried three times, and on the last trial the jury rendered a verdict for the plaintiff for fifteen thousand dollars. The case came, in the usual form, before this court on a motion for a new trial on bills of exceptions. It was argued by counsel, and while under advisement, the defendant settled with the plaintiff by

paying him two thousand dollars, and received from him a release of all claims and demands, and an order to the clerk of this court to enter the case dismissed. This was done without the knowledge of the plaintiff's attorneys.

After this was done, the court rendered its opinion, setting aside the verdict in the case below and ordering a new trial, and then this order to dismiss was filed; and after that the attorneys for the plaintiff came into court and moved the court to set the cause down for trial, notwithstanding the paper filed by the defendant purporting to be acknowledgment that the case had been settled, on the ground that said pretended settlement between the plaintiff and the defendant was collusive, and with the knowledge on the part of the defendant that the plaintiff's attorneys were interested in the case to the extent of their fees for services, and that knowledge of such settlement was being concealed from them by the plaintiff.

The motion was accompanied with an affidavit showing that the plaintiff had agreed to pay his attorney, Mr. McPherson, a contingent fee of 33 per cent of the amount that should be recovered.

The court thereupon passed a peremptory order that the defendant should pay to plaintiff's attorneys one third of the sum of two thousand dollars, and that, in default thereof, the entry of dismissal should be struck out and the case set down for trial. That order was appealed from and that appeal has been the subject of discussion before us.

In the argument here it was claimed, on the part of the attorneys for the plaintiff, that they had a lien on the cause of action, and that the court could enforce it by allowing the suit to proceed to trial for the benefit of the attorneys where it had been adjusted between the parties collusively with a view to cheat the attorneys out of their compensation. Upon the other hand, it was claimed by the defendant that, before judgment, the parties to a pending suit have entire control of the subject-matter, and may settle it between themselves without reference to either the wishes or the interests of the attorneys.

The common law recognizes the lien of an attorney upon moneys of his client in his hands, and, also, upon papers and documents in his hands, whether they be muniments of title, or causes of action, or evidence; but there is no such thing as the lien of an attorney upon a mere claim or cause of action which his client has against a third person, apart from the tangible vouchers of the claim which may be in the attorney's possession. The very essence of the common law lien is possession. The party who has a lien loses it the moment he surrenders possession; and possession cannot be predicated of a mere abstract right in another person. It is conceded on all hands that the parties, before judgment, may compromise and settle between themselves without reference to the

attorney; which could not be the case if the attorney could be regarded as having possession of his client's cause of action. When the cause is once reduced to judgment, however, it is governed by different principles. While a suit is pending, the cause of action may be compromised and settled by the parties out of court; but when reduced to judgment, it can only be settled by an entry of satisfaction on the record; and the person ordinarily recognized as having authority to enter that is the attorney of record; so that he has control over the judgment, and, in a sense of the word, which may be somewhat strained, he may be said to have possession. At all events, the courts have so far recognized it that they allow the attorney a lien on a judgment or an award rendered under the order of the court. In England the practice arose of enforcing these liens of the attorney by a peremptory rule on the defendant, where he had collusively settled with the plaintiff, to pay the attorney his costs.

Then, if the case of the attorney here has any legal foundation, it cannot be on the ground that he has a lien on the cause of action; it must be put upon some other ground. It is maintained, however, that the courts have so far recognized the rights of the attorney, in such cases, that if a settlement takes place between the parties without reference to his interests, they will allow the cause to proceed to trial for his benefit, to the extent of his claim for compensation.

There have been a number of cases cited upon this question which we think have been largely misapprehended. Almost all the cases have been cases of judgments. All the English cases have been cases where, the suit having been reduced to judgment, the lien of the attorney has attached. The only case which is supposed to differ from the others in that respect is the case of Swain *v.* Senate, 5 B. & P., 99.

In that case the defendant was arrested and gave bail, and afterwards left the country. The bail afterwards, without the knowledge of the plaintiff's attorney, settled the case with the plaintiff. Then the attorney proceeded to take judgment by default against the defendant, and that judgment was not impeached or attacked in any way; so that it was in the condition in which the lien attached. Then he issued a scire facias against the bail, and the court did allow that proceeding to go on for the benefit of the attorney to the amount of his costs.

But, as we have said, that was a case where the claim had been reduced to judgment, the condition of things in which the courts had always allowed the lien of the attorney to attach.

American cases have been also referred to here, all of which we have examined; and we find there is only one of them which was a case of tort, in which the privilege of proceeding with the suit for his own benefit was allowed to the attorney after settlement

between the parties and where there was no tangible cause of action that the attorney had in his possession and control.

A case was cited from 22 Wisconsin R. 457, where a suit was brought by the attorney upon a town order, as it was called, and after the settlement between the parties, the attorney was allowed to proceed, upon the ground that he had a lien upon that, not the ground that he had a lien at all upon the cause of action itself, apart from the evidences of it.

The only case that seems to come up squarely to the proposition that, in an action for unliquidated damages, the court will allow the suit to proceed for the benefit of the attorney, is the case of Rasquin against the Knickerbocker Stage Co., 21 Howard's Practice Reports, 292; and that decision seems to have been rendered upon the authority of Swain v. Senate, which seems to have been misconceived by the court. This decision, reported in Howard and cited here, was rendered in the Court of Common Pleas of the city of New York, which is not a court of last resort. But this is to be remarked about that case, and about others that seem to countenance the proposition, that the court will allow a case to proceed for the benefit of the attorneys, viz., that that has never been done except to allow the attorney to secure his legal fees and costs; never to enable him to secure the compensation which his client may have agreed to pay him as counsel. It is necessary to note the distinction.

In the administration of the law in England, and more or less in this country, also, every step taken in a case involves not only the payment of a compensation to the officers of the court, but also the earning of fees by the attorney of record. If the plaintiff recovers judgment, these fees and costs of his attorney are included in his judgment and become part of it, and as fast as they are earned, the suit becomes, to that extent, the suit of the attorney. He thereby virtually becomes a party to the suit, quoad his legal fees; and it is very proper that the court should say to the defendant, "you cannot settle this suit until you settle the claims of all the parties on the record," and the attorney being, quoad these fees, a party on record, his fees must be provided for before the case can be dismissed. But the reason would not apply to a collateral contract between the attorney and his client.

This present case illustrates the distinction particularly. Here is a claim for unliquidated damages, which is, in its very nature, incapable of being assigned in whole or in part to the attorney. And, in fact, the agreement which is relied upon here does not purport to assign it in any part; but is simply an engagement on the part of the plaintiff to pay his attorney a contingent fee of thirty-three per cent of the amount of the recovery; that is, he agrees that in case of recovery, he, personally, will pay to his counsel a sum equivalent to thirty-three per cent of the amount

recovered. It is clear, therefore, that he might as well agree to pay a gross sum of one thousand dollars, or any other gross sum, or to convey a house and lot in case of success in the suit.

Now in no sense can that collateral engagement of the client to his attorney be said to be involved in this suit. Here is an action for damages suffered by the client. It is not a suit to recover money stipulated in a collateral agreement to be paid by client to attorney, but it is to recover damages for injuries alleged to have been suffered by the client, and, quoad that, the attorney cannot be interested as a party in the suit. It might as well be said that, where the client had agreed to do some collateral thing in case of the recovery of judgment, to convey a house and lot for example, the court could, after this settlement, hold the defendant responsible for the plaintiff's engagement to convey that house and lot to his attorney. You could maintain that proposition with as much reason as that the court could compel the defendant to pay to the attorney of the plaintiff, the moneys or considerations which the client had collateraly engaged to pay to his attorney. The courts will not enforce such a claim in that way. They leave the attorney to his common law remedy on the contract.

We think the whole course of the authorities is in that direction. The law is stated in the first place, in Parsons on Contracts, vol. 1, p. 116, as follows: "He [the attorney] has no claim for unliquidated damages in court, until after judgment." The case of Wood *v.* Anders, 5 Bush, 641, is cited, which fully sustains this proposition.

Again in Parsons, vol. 3, p. 269: "But the lien on the cause for his fees does not attach until the judgment is rendered. Therefore, where in a case reserved, after the opinion of the court was pronounced in favor of the plaintiff, he forthwith assigned his interest in the judgment, and the defendant, during the term and before the judgment was actually entered, paid the whole amount to the assignee; it was held that the attorney's lien was thereby defeated."

In support of this, several cases are cited, all of which fully sustain the position in the text.

Besides these there are two cases in the New York Reports, which investigate the question very thoroughly. The first is the case of Pulver *v.* Harris, 52 New York Reports, 73. That was an action for assault and battery. The plaintiff recovered a judgment which he assigned to his attorney to secure his costs, and notice of the assignment was given to the defendant. The defendant appealed and the decision was reversed, and before the trial the parties settled, and the plaintiff executed to the defendant a release. Notwithstanding this, the plaintiff's attorney moved the trial of the action when it was reached on the calendar, and the defendant's counsel produced the release.

The court held that the cause of action was not assignable, and that after the reversal of the judgment the assignment thereof became inoperative, so far as the defendants rights were concerned; and that, as to him, the cause of action belonged to the plaintiff, which he could not transfer, and which remained subject to his control until merged in a judgment, or at least in a verdict. Judge Grover said: "It may be said that although the plaintiff was the owner of the cause of action, and as such had a right to control and settle the suit, yet the defendant, knowing that the attorney relied upon the fruits of the action as security for the services, ought to have paid the money to him, instead of the plaintiff, upon the settlement. The answer to this is that the attorney, having no legal or equitable lien upon the cause of action, the defendant had the right to pay the money to the plaintiff, to whom it belonged, and was not bound to take care of the interests of the attorney."

This case was followed by the case of Coughlin v. The Hudson River R. R. Co., 71 N. Y. Rep. 443. That was a very similar case. There the plaintiff was injured while a passenger on the defendant's railroad. He brought suit, and executed an agreement with his attorneys to divide with them the damages that might be recovered against the defendant, and the agreement was that if nothing should be recovered, the attorneys should have nothing for their services. Subsequently the plaintiff called at the office of the defendant's attorneys and had some negotiation with them, and made a settlement.

The court said:

"It is certainly a general rule that parties to an action may settle the same without the intervention of the attorneys. Generally, a plaintiff who has a cause of action against a defendant may release and discharge it upon such terms as are agreeable to him. This he may do while the action is pending, and after judgment he may cancel and discharge the judgment. In all this generally he infringes upon no privilege and violates no right of his attorney.

"But since the time of Lord Mansfield, it has been the practice of courts to intervene to protect attorneys against settlements made to cheat them out of their costs. If an attorney has commenced an action, and his client settles it with the opposite party before judgment, collusively, to deprive him of his costs, the court will permit the attorney to go on with the suit for the purpose of collecting his costs.

* * * * * * *

"After judgment, the attorney who has procured it has a lien upon it for costs. This lien is upheld upon the theory that the services and skill of the attorney have procured the judgment. There is, then, something upon which a lien can attach, and the courts uphold the lien by an extension to such cases of the prin-

ciple which gives a mechanic a lien upon a valuable thing which, by his skill and labor, he has produced.

* * * * * * *

"A person having a judgment for the recovery of money may give his attorney, or any other person, by agreement, rights and equitable interests therein, which the defendant therein, charged with notice, must respect. So, if the cause of action before judgment be in its nature assignable, the owner of it may assign and, by agreement, create legal and equitable interests therein, and such agreements may now be made with his attorneys as well as with other persons, and when such interests have been created and notice given of them, they must be respected. But what I maintain is that before judgment, in the absence of any agreement, the attorney has not now and never had any lien upon, or interest in, the cause of action; and when the cause of action is like this, such as by its nature is not assignable, the party owning it cannot, by any agreement, give his attorney, or any other person, any interest therein."

In People *v.* Tioga C. P. (19 Wend. 73), Cowen, J., said: "Assignments of personal injuries must still be regarded as mere covenants or promises which we cannot directly protect against the interference of the immediate party, though the defendant has full notice of the effort to assign. If the person professing to assign will do prejudice to the right by extinguishing or impairing it, the party with whom he deals must be left to his action for damages according to the nature of the undertaking. Mere personal torts of this kind cannot be separated from the person upon whom they are inflicted and they die with him.

"Here, there was not even an agreement by plaintiff to assign any portion of the claim to his attorneys. The agreement executed did not purport to give them any present interest in the cause of action. It was simply an executory agreement that the attorneys should share in the damages recovered, the cause of action remaining intact to the plaintiff. Still the agreement to divide the recovery in such a case would attach itself to the judgment when recovered, and give the attorney an equitable interest therein.

"It is, therefore, beyond dispute, that the plaintiff's attorney had neither a legal nor equitable interest by way of any assignment or lien on the cause of action. The defendant was not asking any favor of the court. It was in court simply insisting upon its settlement with the plaintiff as a defense to his cause of action. Therefore, if the attorneys are entitled to the protection they now seek, it is only by the extraordinary power of the court, to which I have first above alluded, and I am prepared to say that such power should not be exercised in a case like this. It has not been conferred upon the courts by statute, usage or common law. Its exercise to secure to an attorney the statutory fees, small in amount

and easily ascertainable, was just and proper, and could lead to no abuse. But to exercise it so far as to enforce all contracts between clients and attorneys, however extraordinary, is quite another thing. Here the attorneys were contractors. They took the job to carry this suit through, and to furnish all the labor and money needed for that purpose, and they are no more entitled to the protection which they now seek than any other person not a lawyer would have been if he had taken the same contract. When a party has the whole legal and equitable title to a cause of action, public policy and private right are best subserved by permitting him to discharge that, if he desires to, without the intervention of his attorneys."

This case has been followed up since by the case of Kusperer v. The City of Beaver Dam, in Wisconsin, in 1881, which is found reported in a late number of the Northwestern Reporter. That was an action for personal injury, in which the facts were to a very large extent the same as in the cases I have just cited, and those cases were referred to and the decisions reaffirmed by the court in Wisconsin.

But enough has been said to show that all the cases hold uniformly that the court will not interfere to enforce in a summary way through the original suit, the collateral engagements of a client for the compensation of his attorney. We are certainly as desirous as any court could be to protect the members of the bar in their relations with their clients, but it clearly seems to be, if not beyond the power of the court, certainly a practice not sustained by any authority or precedent, to enforce an engagement of this character in a summary way; the court will leave the attorney to his common law remedy, and, therefore, we are compelled to reverse the order of the court below and to allow the order of settlement to stand.

There was a question suggested in the consultation in this case as to whether the order appealed from was an appealable order. We wish not to be committed to any decision on that question. We are satisfied upon the merits of the case that the order below ought to be reversed.

Settling Cause without Consent of Plaintiff's Attorney.—Where there is no fraud or collusion or intent to cheat the attorney of the plaintiff in a cause out of his just costs, the parties may settle the matter without his intervention. Chapman v. Hare, 1 Taunt. 341; Jordan v. Hunt, 1 Gale, 159; Nelson v. Wilson, 4 Moore & P. 385.

But where the plaintiff's attorney has notified defendant not to settle with plaintiff without paying him his bill of costs, the defendant will in the event of such settlement be liable over to the attorney. Welsh v. Hole, 1 Doug. 238; Read v. Duppa, 6 Tenn. 361.

Where, however, the settlement is collusive and with intent to cut out the claim of the plaintiff's attorney, the defendant is liable notwithstanding the settlement. Ex parte Games, 3 Hurl. & C. 294; Brunsden v. Allard, 2 Ell. & E. 19; Francis v. Webb, 7 C. B. 731; Jones v. Bonner, 2 Exch. 230.

It is said that where the claim in question is unliquidated, the parties in interest may compromise and settle irrespective of the claim of the plaintiff's attorney for costs. Ex parte Hart, 1 Barn. & Ad. 660. But see McKenzie *v.* Rhodes, 13 Abb. Pr. 337; Rasquin *v.* Knickerbocker Stage Co., 21 How. Pr. 293; Richardson *v.* Brooklyn City, 24 How. Pr. 321; Fox *v.* Fox, 24 How. Pr. 409.

The attorney of defendant has no such interest in a suit as to prevent the parties from compromising it without his consent. Quested *v.* Callis, 10 Mees. & W. 18.

HINKLE
v.
MINNEAPOLIS AND ST. L. RY. CO.

(*Advance Case, Minnesota. January* 24, 1884.)

If one having a cause of action unliquidated in respect to amount, for a personal injury caused by the negligence of another, and, knowing all the facts, demands and receives from the wrong-doers a stated sum of money, on account of the injury, there being no express agreement that it shall be in satisfaction, either in whole or in part, of the cause of action, the presumption is that it was intended by the parties as a full recompense for the injury, and operates as an accord and satisfaction, barring a subsequent action to recover damages for the same injury.

APPEAL from an order of the District Court, Hennepin County, overruling and denying plaintiff's motion for a new trial.

Merrick & Merrick for appellant, Peter A. Hinkle. J. D. Springer for respondent, the Minneapolis & St. L. Ry. Co.

DICKINSON, J.—In June, 1881, the plaintiff, who was in the employ of the defendant as a locomotive engineer, was injured by the breaking down of a turn-table, upon which his engine was standing. After some seven weeks of disability, by reason of the accident, he resumed work in the service of the defendant. This action was subsequently commenced to recover for such injuries, which are claimed to have been of a serious and permanent character. The cause of action alleged is negligence of the defendant in respect to the condition of the turn-table. The answer put in issue the responsibility of the defendant for the accident, and the extent of the injury received, and pleaded a settlement and discharge of the alleged cause of action. Upon the evidence presented at the trial the court directed a verdict for the defendant on the ground that the case showed that the action had been barred by a previous satisfaction of the plaintiff's demand. The correctness of this disposition of the case is called in question by this appeal.

In determining whether the bill of exceptions shows an accord

and satisfaction respecting the cause of action here asserted, we disregard the evidence on the part of the defendant, going to sustain the direction of the court below, and which was controverted by the plaintiff. We regard only the evidence of the plaintiff and the undisputed facts. The plaintiff testified to the effect that seven weeks or more after the accident, and which must have been at or subsequent to the time when he had so far recovered from his injuries that he resumed work, he had some talk with the defendant's master-mechanic about paying him (plaintiff) for his lost time and his doctor's bill. He had then incurred and paid physicians' charges to the amount of $16. The plaintiff then says: "The company agreed to pay me my doctor's bill, $16, and one half my time, $76.25. I made no claim against the company on account of said accident at or before the time my wife received the said $91.25, than for said doctor's bill and one half time." This sum of $91.25 was paid by the defendant to the plaintiff's wife, and he, knowing this fact, acquiesced in the payment as though it had been made to him, by suffering the money to be used in paying household expenses.

It is to be presumed that the plaintiff knew, at the time of this transaction, that he had suffered the physical injury of which he now complains and that it was occasioned by the defendant's negligence. If in fact the plaintiff did not then know of the negligence of the defendant, and that hence he had a legal cause of action against it, or if any other fact existed which was peculiarly within the plaintiff's own knowledge and which would tend to rebut the conclusion that the payment demanded and received from the wrong-doer on account of the injury was intended to be a recompense for what had been suffered, it was incumbent on the plaintiff to show it. That the plaintiff did assert a claim against the defendant for the payment of the sum which was paid is apparent from his own language above recited. It further appears from the testimony that there was no express agreement that the money paid should be in satisfaction, in whole or in part, for the injury. The legal effect of this evidence as showing a satisfaction of the cause of action now asserted is not impaired by the other evidence in the case. If it had been expressly agreed between the parties that this payment should be in full satisfaction of all right of recovery, by reason of the accident, it would have had the legal effect to bar this action. It would have been an accord and satisfaction. The demand being unliquidated, or the right of action being doubtful, the amount of the consideration accepted in satisfaction would not be material. "An accord and satisfaction is a contract executed. It consists of an agreement of the parties that some new consideration shall be accepted in satisfaction of an existing demand or cause of action, and the carrying of the agreement into effect by a delivery and acceptance of the new consideration. It is obviously not essential in such a contract, more than in other con-

tracts, that the agreement be expressed. It may be implied from circumstances, clearly and unequivocally indicating the intention of the parties.

The inference to be drawn from the facts we have recited is that the parties intended the compensation which was demanded and paid to be a recompense for the injury suffered. The cause of action existing in favor of the plaintiff was one and entire. Upon the facts now alleged he was entitled to recover, as general damages, compensation for the consequences which, by implication of law, were to be regarded as resulting from the wrong complained of, and as special damages for medical attendance and loss of time. It is only as respects the pleadings and the mode of proof that any important distinction exists between these general and special damages, and it is important that the compensation demanded and paid in this case, what may be termed special damages. The essential fact is that the plaintiff having been injured by the wrong of the defendant, and knowing his legal right of recovery, demanded from the wrong-doer and received a certain sum of money on account of the injury suffered. The only claim then made was fully satisfied by payment. But one construction can be reasonably put upon this evidence, and that is that the parties intended the sum demanded on account of the accident, and paid in response to such demand, as a recompense for the injury suffered. Such being the intention of the parties, the transaction had the effect of an accord and satisfaction. These facts being undisputed, unexplained and unqualified, being such as are susceptibe of no other reasonable construction than that above indicated, their effect was properly determined by the court without submission to the jury. See Washburn *v.* Winslow, 16 Minn. 33. If the payment by the railroad company had been voluntarily made, and not pursuant to an asserted claim of the defendant, or if any other circumstance had given to it the character of a gratuity or of a recompense in part only, the result would have been different.

The order denying plaintiff's motion for a new trial is affirmed.

Accord and Satisfaction.—As to what amounts to an accord and satisfaction for a personal tort see the following authorities: Rideal *v.* Great Western R. Co., 1 F. & F. 706; Roberts *v.* Eastern Counties R. R. Co., 1 F. & F. 460; Peace *v.* Stamet, 4 J. J. Marsh (Ky.), 449; Coon *v.* Knap, 8 N. Y. 402; Stockton *v.* Frey, 4 Gill. (Md.) 406.

HAYES
v.
MICHIGAN CENTRAL R. CO.

(*Advance Case, Supreme Court of the United States. April* 7, 1884.)

Where a municipal ordinance, in granting a railroad the right of way through the city, requires it to maintain suitable fences, and provides that upon the acceptance by the company of the benefit of the ordinance covenants shall be executed by both parties, embodying its terms, the enactment is not merely a contract between the public corporation and the railroad, but a positive mandate for the benefit of the individual citizens, any one of whom is entitled to recover damages suffered by him through the neglect of the company to discharge the duties thus imposed.

Where an ordinance required such sufficient walls and fences to be maintained as would secure persons and property from danger, "said structure to be of such height as the city council may direct," *held*, that the obligation to build sufficient fences was absolute, even though no directions were given by the city council.

A clause in the charter of a city conferring power upon the council to provide protection against injury to persons and property in the use of railroads, is sufficient warrant for an ordinance requiring a railroad company to maintain a guard between the line of its road and a public park.

Where a child playing in a public park strayed upon the railway and was injured, *held*, that it was a question of fact for the jury whether the absence of a fence was the cause of the mishap. It is not necessary, in order to charge the company with the responsibility, that its negligence should be the efficient cause of the injury; if the injury would not have occurred but for such negligence, that is enough.

IN error to the Circuit Court of the United States for the Northern District of Illinois.

A. D. Rich for plaintiff in error.

Ashley Pond for defendant in error.

MATTHEWS, J.—This action was brought by the plaintiff in error to recover damages for personal injuries alleged to have been caused by the negligence of the defendant in error. After the evidence in the cause had been closed, the court directed the jury to return a verdict for the defendant. A bill of exceptions to that ruling embodies all the circumstances material to the case, and presents the question, upon this writ of error, whether there was sufficient evidence to entitle the plaintiff below to have the issues submitted to the determination of the jury.

The defendant, in running its trains into Chicago, used the tracks of the Illinois Central R. R. Co., under an arrangement between them; and no question is made but that the defendant is to be treated, for the purposes of this case, as the owner as well as occupier of the tracks. The tracks in question are situated for a

considerable distance in Chicago, including the place where the injury complained of was received, on the lake shore. They were built in fact, at first, in the water on piles; a breakwater constructed in the lake protecting them from winds and waves, and on the west or land side the space being filled in with earth, a width of about 280 feet, to Michigan avenue, running parallel with the railroad. This space between Michigan avenue and the railroad tracks is public ground, called Lake park, on the south end of which is Park row, a street perpendicular to Michigan avenue, and leading to and across the railroad tracks to the water's edge. Numerous streets, from Twelfth street north to Randolph street, intersect Michigan avenue at right angles, about 400 feet apart, and open upon the park, but do not cross it. Nothing divides Michigan avenue from the park, and the two together form one open space to the railroad. The right of way for these tracks was granted to the company by the city of Chicago over public grounds by an ordinance of the common council, dated June 14, 1852, the sixth section of which is as follows:

"Sec. 6. The said company shall erect and maintain on the western or inner line of the ground pointed out for its main track on the lake shore, as the same is hereinbefore defined, such suitable walls, fences, or other sufficient works as will prevent animals from straying upon or obstructing its tracks, and secure persons and property from danger; said structure to be of suitable materials and sightly appearance, and of such height as the common council may direct, and no change therein shall be made except by mutual consent: provided, however, that the company shall construct such suitable gates, at proper places at the ends of the streets which are now or may hereafter be laid out, as may be required by the common council, to afford safe access to the lake; and provided, also, that in case of the construction of an outside harbor, streets may be laid out to approach the same, in the manner provided by law, in which case the common council may regulate the speed of locomotives and trains across them."

It was also provided in the ordinance that it should be accepted by the railroad company within 90 days from its passage, and that thereupon a contract under seal should be formally executed on both parts, embodying the provisions of the ordinance, and stipulating that the permission, rights, and privileges thereby conferred upon the company should depend upon their performance of its requirements. This contract was duly executed and delivered March 28, 1853.

The work of filling in the open space between the railroad tracks and the natural shore line was done gradually,—more rapidly after the great fire of October 9, 1871, when the space was used for the deposit of the debris and ruins of buildings,—and the work was completed substantially in the winter of 1877–78. In the mean

time several railroad tracks had been constructed by the railroad company on its right of way, used by itself and four other companies for five years prior to the time of the injury complained of, and trains and locomotives were passing very frequently, almost constantly. The railroad company had also partially filled with stones and earth the space east of its tracks, to the breakwater; sufficiently so in some places to enable people to get out to it. This they were accustomed to do for the purpose of fishing and other amusements, crossing the tracks for that purpose. At one point there was a roadway across the park and the tracks, used by wagons for hauling materials for filling up the space, and a flagman was stationed there. At this point great numbers of people crossed to the breakwater; from two streets the public were also accustomed to cross over the tracks from the park to ferry-boats. From Park row, at the south end of the park, running north a short distance, the railroad company, in 1872, had erected on the west line of its right of way a five-board fence, the north end of which, at the time of the injury to the plaintiff, was broken down. The rest of it was in good order. The park was public ground, free to all, and frequented by children and others as a place of resort for recreation, especially on Sundays. Not far from the south end, and about opposite the end of the fence, was a band-house for free open-air concerts.

The plaintiff was a boy between eight and nine years of age, bright and well-grown, but deaf and dumb. His parents were laboring people, living, at the time of the accident, about four blocks west of Lake park. Across the street from where they lived was a vacant lot where children in the neighborhood frequently played. On Sunday afternoon, March 17, 1878, St. Patrick's day, the plaintiff, in charge of a brother about two years older, went to this vacant lot, with the permission of his father, to play. While playing there a procession celebrating the day passed by, and the plaintiff, with other boys, but without the observation of his brother, followed the procession to Michigan avenue at Twelfth street, just south of Lake park. He and his companions then returned north to the park, in which they stopped to play. A witness, going north along and on the west side of the tracks, when at a point a considerable distance north of the end of the broken fence, saw a freight train of the defendant coming north; turning round towards it he saw the plaintiff on the tracks south of him, but north of the end of the fence; he also saw a colored boy on the ladder on the side of one of the cars of the train, motioning as if he wanted the plaintiff to come along. The plaintiff started to run north beside the train, and as he did so turned and fell, one or more wheels of the car passing over his arm. There were four tracks at this point, and the train was on the third track from the park. The plaintiff had his hands reached out towards the car, as

he ran, as if he was reaching after it, and seemed to the witness to be drawn around by the draught of the train, and fall on his back. Amputation of the left arm at the shoulder was rendered necessary, and constituted the injury for which damages were claimed in this suit.

The question of contributory negligence does not appear to us to arise upon this record. It is not contended by the counsel for the defendant in error, that, if there was evidence tending to prove negligence on its part, the case could properly have been withdrawn from the jury on the ground that it appeared as matter of law that the plaintiff was not entitled to recover by reason of his own contributory negligence. The single question, therefore, for present decision is whether there was evidence of negligence on the part of the defendant which should have been submitted to the jury. The particular negligence charged in the declaration and relied on in the argument, is the omission of the railroad company to build a fence on the west line of its right of way, dividing it from Lake park; a duty, it is alleged, imposed upon it by the ordinance of June 14, 1852, a breach of which, resulting in his injury, confers on the plaintiff a right of action for damages. It is not claimed on the part of the plaintiff in error that the railroad company was under an obligation, at common law, to fence its tracks generally, but that, at common law, the question is always whether, under the circumstances of the particular case, the railroad has been constructed or operated with such reasonable precautions for the safety of others, not in fault, as is required by the maxim, sic utere tuo, ut non alienum lædas; that, consequently, in circumstances where the public safety requires such a precaution as a fence to prevent danger from ordinary operations of the railroad, to strangers not themselves in fault, the omission of it is negligence; and that it is a question of fact for a jury whether the circumstances exist which create such a duty.

This principle has been recognized and applied in cases of collisions at crossings of railroads and public highways, when injuries have occurred to persons necessarily passing upon and across railroad tracks in the use of an ordinary highway. "These cases," said the supreme court of Massachusetts, in Eaton *v.* Fitchburg R. Co., 129 Mass. 364, "all rest on the common-law rule that when there are different public easements to be enjoyed by two parties, at the same time and in the same place, each must use his privilege with due care, so as not to injure the other. The rule applies to grade crossings, because the traveller and the railroad each has common rights in the highway at those points. The fact that the legislature has seen fit, for the additional safety of travellers, imperatively to require the corporation to give certain warnings at such crossings, does not relieve it from the duty of doing whatever else may be reasonably necessary." It was accordingly held

in that case that the jury might properly consider whether, under all the circumstances, the defendant was guilty of negligence in not having a gate or a flag-man at the crossing, although not expressly required to do so by any statute or public authority invested with discretionary powers to establish such regulations. And the same principle has been applied in other cases than those of the actual coincidence at crossings in public highways. In Barnes v. Ward, 9 C. B. 392, it was decided, after much consideration, that the proprietor and occupier of land making an excavation on his own land, but adjoining a public highway, rendering the way unsafe to those who used it with ordinary care, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road, and liable to an action for damages to one injured by reason thereof; for the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is, in effect, as much impeded as in the case of an ordinary nuisance to a highway. This doctrine has always since been recognized in England. Hardcastle v. South Yorkshire Ry. Co., 4 Hurl. & N. 67; Hounsell v. Smyth, 7 C. B. (N. S.) 731; Binks v. South Yorkshire Ry. Co., 3 Best & S. 244. It has also been generally adopted in this country. Norwich v. Breed, 30 Conn. 535; Beck v. Carter, 68 N. Y. 283; Homan v. Stanley, 66 Pa. St. 464; B. & O. R. Co. v. Boteler, 38 Md. 568; Stratton v. Staples, 59 Me. 94; Young v. Harvey, 16 Ind. 314; Coggswell v. Inhab. of Lexington, 4 Cush. 307; although Howland v. Vincent, 10 Metc. 371, is an exception.

The enforcement of this rule in regard to excavations made by proprietors of lots adjacent to street and public grounds in cities and towns, in the prosecution of building enterprises, and in the construction of permanent areas for cellar-ways, is universally recognized as an obvious and salutory exercise of the common police powers of municipal government; and the omission to provide barriers and signals, prescribed by ordinance in such cases for the safety of individuals in the use of thoroughfares, is a failure of duty, charged with all the consequences of negligence, including that of liability for personal injuries, of which it is the responsible cause. The true test is, as said by Hoar, J., in Alger v. City of Lowell, 3 Allen, 402, "not whether the dangerous place is outside of the way, or whether some small slip of ground not included in the way must be traversed in reaching the danger, but whether there is such a risk of a traveller, using ordinary care, in passing along the street, being thrown or falling into the dangerous place, that a railing is requisite to make the way itself safe and covenient."

As the ground of liability in these cases is that of a public nuisance, causing special injury, the rule, of course, does not apply where the structure complained of on the defendant's property,

and the mode of its use, are authorized by law; and, consequently, what has been said is not supposed to bear directly and strictly on the question in the present case, but rather as inducement, showing the ground of legislative authority implied in the ordinance, the breach of which is imputed to the defendant as negligence towards the plaintiff, and as serving to interpret the meaning and application of its provisions. The ordinance cannot, we think, be treated as a mere contract between the city, as proprietor of the land over which the right of way is granted, and the railroad company, to which no else is privy, and under which no third person can derive immediately any private right, prescribing conditions of the grant, to be enforced only by the city itself. Although it takes the form of a contract, provides for its acceptance, and contemplates a written agreement in execution of it, it is also and primarily a municipal regulation, and as such, being duly authorized by the legislative power of the State, has the force of law within the limits of the city. Mason *v.* Shawneetown, 77 Ill. 533. Neither can the ordinance be limited by construction to the mere purpose of preventing animals from straying upon or obstructing the railroad tracks; because, in addition to that, it expressly declares that the walls, fences, or other works required shall be suitable and sufficient to secure persons and property from danger. This cannot refer to persons and property in course of transportation and already in care of the railroad company as common carrier, for the duty to carry and deliver them safely was already and otherwise provided for by law; nor can it be supposed, from the nature of the case, that the stipulation was intended as security for any corporate interest of the city. The proviso in the sixth section, that the company shall construct such suitable gates at crossings, as thereafter might be required by the common council, to afford safe access to the lake, clearly designates the inhabitants of the city as at least within the scope of this foresight and care, the safety of whose persons and property was in contemplation.

The prevention of animals from straying upon the tracks, and the security of persons and property from danger, are two distinct objects, for both which the requirement is made of suitable walls, fences, or other protections; and the ordinance, in these two particulars, is to be referred to distinct legislative grants of power to the municipal body. The general act to provide for the incorporation of cities and villages, which constitutes the charter of the city of Chicago, confers upon this city council power: "Twenty-sixth. To require railroad companies to fence their respective railroads, or any portion of the same, and to construct cattle-guards, crossings of streets, and public roads, and keep the same in repair within the limits of the corporation. In case any railroad company shall fail to comply with any such ordinance, it shall be liable for all damages the owner of any cattle or horses or other domestic

animal may sustain, by reason of injuries thereto while on the track of such railroad, in like manner and extent as under the general laws of this State relative to the fencing of railroads." Cothran's Rev. St. Ill. 1884, p. 227. By the general law of the State, requiring railroads to be fenced, except within the limits of municipal corporations, the company omitting performance of the duty is liable to the owner for all damages to animals, irrespective of the question of negligence. Id. p. 1151. Whether this provision is limited to the protection of animals, and covers only the case of damage done to them, or whether a failure to comply with the ordinance authorized thereby might be considered as evidence of negligence, in case of injury to person or property, in any other case, it is not necessary for us now to decide; for in the same section of the statute there is this additional power conferred upon the city council: "Twenty-seventh. To require railroad companies to keep flag-men at railroad crossings of streets, and provide protection against injury to persons and property in the use of such railroads," etc. The latter clause of this provision is general and unrestricted. It confers plenary power over railroads within the corporate limits, in order that by such requirement as in its discretion it may prescribe, and as are within the just limits of police regulations, the municipal authority may provide protection against injury to persons and property likely to arise from the use of railroads. And, as we have shown by reference to analogous cases, the erection of a barrier between the railroad tracks and the public highways and grounds, particularly such a resort as the Lake park is shown to be, in the present case, is a reasonable provision, clearly within the limits of such authority. To leave the space between the park and the breakwater, traversed by the numerous tracks of a railroad company, open and free, under the circumstances in proof, was a constant invitation to crowds of men, women, and children frequenting the parks to push across the tracks at all points to the breakwater, for recreation and amusement, at the risk of being run down by constantly passing trains. A fence upon the line between them might have served, at least, as notice and signal of danger, if not as an obstacle and prevention. For young children, for whose health and recreation the park is presumably in part intended, and as irresponsible, in many cases, as the dumb cattle, for whom a fence is admitted to be some protection, such an impediment to straying might prove of value and importance. The object to be attained—the security of the persons of the people of the city—was, we think, clearly within the design of the statute and the ordinance; and the means required by the latter to be adopted by the railroad company were appropriate and legitimate. Mayor, etc., of New York *v.* Williams, 15 N. Y. 502.

It is said, however, that it does not follow that whenever a statutory duty is created, any person, who can show that he has sus-

tained injuries from the non-performance of that duty, can maintain an action for damages against the person on whom the duty is imposed; and we are referred to the case of Atkinson *v.* Newcastle Water-works Co., 2 Exch. Div. 441, as authority for that proposition, qualifying as it does the broad doctrine stated by Lord Campbell in Couch *v.* Steel, 31 El. & Bl. 402. But accepting the more limited doctrine admitted in the language of Lord Cairns in the case cited, that whether such an action can be maintained must depend on the "purview of the legislature in the particular statute, and the language which they have there employed," we think the right to sue, under the circumstances of the present case, clearly within its limits. In the analogous case of fences, required by the statute as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although in the case of injury to persons, by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence. The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery. "The nature of the duty," said Judge Cooley in Taylor *v.* Lake Shore & M. S. Ry. Co., 45 Mich. 74; s. c., 7 N. W. Rep. 728, "and the benefits to be accomplished through its performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit." See, also, Railroad Co. *v.* Terhune, 50 Ill. 151; Schmidt *v.* Milwaukee & St. P. Ry. Co., 23 Wis. 186; Siemers *v.* Eisen, 54 Cal. 418; Galena & C. U. R. Co. *v.* Loomis, 13 Ill. 548; O. & M. R. Co. *v.* McClelland, 25 Ill. 140; St. L., V. & T. H. R. Co. *v.* Dunn, 78 Ill. 197; Massoth *v.* Railroad, 64 N. Y. 524; B. & O. R. R. *v.* State, 29 Md. 252; Pollock *v.* Eastern R. R., 124 Mass. 158; Cooley, Torts, 657.

It is said, however, that, in the present case, the failure or omission to construct a fence or wall cannot be alleged as negligence against the company, because, as the structure was to be, as described in the ordinance, of suitable materials and sightly appearance, and of such height as the common council might direct, no duty could arise until after the council had directed the character of the work to be constructed, of which no proof was offered. But the obligation of the company was not conditioned on any previous directions to be given by the city council. It was absolute, to build a suitable wall, fence, or other sufficient work as would prevent animals from straying upon the tracks, and secure persons and property from danger. The right of the council was to give specific directions if it saw proper, and to supervise the

work when done, if necessary; but it was matter of discretion, and they were not required to act in the first instance, nor at all, if they were satisfied with the work as executed by the railroad company. Tallman v. Syracuse, B. & N. Y. R. Co., 4 Keyes, 128; Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475.

It is further argued that the direction of the court below was right, because the want of a fence could not reasonably be alleged as the cause of the injury. In the sense of an efficient cause, causa causans, this is no doubt strictly true; but that is not the sense in which the law uses the term in this connection. The question is, was it causa sine qua non,—a cause which, if it had not existed, the injury would not have taken place,—an occasional cause; and that is a question of fact, unless the causal connection is evidently not proximate. Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469. The rule rule laid down by Willes J., in Daniel v. Metropolitan Ry. Co., L. R. 3 C. P. 216, 222, and approved by the exchequer chamber (L. R. 3 C. P. 591), and by the house of lords (L. R. 5 H. L. 45), was this: "It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to;" and in the case of Williams v. Great Western Ry. Co., L. R. 9 Exch. 157, where that rule was applied to a case similar to the present, it was said (page 162): "There are many supposable circumstances under which the accident may have happened, and which would connect the accident with the neglect. If the child was merely wandering about, and he had met with a stile, he would probably have been turned back; and one, at least, of the objects for which a gate or stile is required, is to warn people of what is before them, and to make them pause before reaching a dangerous place like a railroad." See Maher v. Winona & St. P. R. Co., 13 Am. & Eng. R. R. Cas. 572.

The evidence of the circumstances, showing negligence on the part of the defendant, which may have been the legal cause of the injury to the plaintiff, according to the rule established in Railroad Co. v. Stout, 17 Wall. 657, and Randall v. B. & O. R. Co., 109 U. S. 478, should have been submitted to the jury; and for the error of the circuit court in directing a verdict for the defendant, the judgment is reversed and a new trial awarded.

POWERS OF MUNICIPALITY AS TO RAILROADS IN STREETS.

Speed.—A municipality has power to regulate the speed with which a railroad shall be allowed to run cars through its streets. Railroad Co. v. Buffalo, 5 Hill, 209; Donnaher v. State, 8 Sm. & M. (Miss.) 649; C., B. & Q. R. R. Co. v. Haggerty, 67 Ill. 113; Chicago, R. I. & P. R. Co. v. Reidy, 66 Ill. 43; Mealis v. Haywards, 48 Ind. 19; Richmond, etc.. R. R. Co. v. Richmond, 96 U. S. 521; Meyers v. Chicago, R. I. &. P. R. Co., 7 Am. & Eng.

R. R. Cas. 406; North C. C. R. Co. *v.* Lake View, 11 Am. & Eng. R. R. Cas. 42.

Obstruction.—It may also prohibit the blocking up of streets by leaving cars standing thereon. Gahagan *v.* Railroad Co., 1 Allen (Mass.), 187; Railroad Co. *v.* Galena, 40 Ill. 344; Railroad Co. *v.* Decatur, 33 Ill. 381; Railroad Co. *v.* Chenca, 43 Ill. 209.

Flagmen.—It may require the posting of a flagman at reasonable places and times. T. W. & W. R. R. Co. *v.* Jacksonville, 67 Ill. 37; Penna. Co. *v.* Hensil, 6 Am. & Eng. R. R. Cas. 79.

Lights.—When it is authorized by statute, it may require a railroad company to light its road. Cincinnati, etc., R. R. Co. *v.* Sullivan, 32 Ohio St. 152.

Violation of Municipal Ordinance.—The weight of authority is to the effect that the mere violation of a municipal ordinance is not proof of negligence per se but merely evidence of it. Lane *v.* Atlantic Works, 111 Mass. 136; Liddy *v.* St. Louis R. R. Co., 40 Mo. 506; Baltimure City Pass. Ry. Co. *v.* McDonnell, 42 Md. 534; Madison & I. R. Co. *v.* Mathias, 50 Ind. 65; Phila. & Reading R. R. Co. *v.* Boyer, 2 Am. & Eng. R. R. Cas. 172; Van Horn *v.* Burlington, etc., R. Co., 7 Am. & Eng. R. R. Cas. 591, Faber *v.* St. Paul, etc., R. Co., 8 Am. & Eng. R. R. Cas. 277.

The cases in New York still profess to abide by this rule, but seem to be gradually getting away from it. Jetter *v.* New York & Harlem R. R. Co., 2 Keyes, 154; Brown *v.* Buffalo & State Line R. Co., 22 N. Y. 191; Besiegel *v.* N. Y. Central R. Co., 14 Abb, Pr. 29; McGrath *v.* New York Central R. Co., 63 N. Y. 522; Massoth *v.* Del. & H. Canal Co., 64 N. Y. 524.

In Indiana, Illinois and Iowa it seems that a violation of a municipal ordinance is negligence per se. Pennsylvania Co. *v.* Hensil, 70 Ind. 569; St. Louis, V. & T. H. R. R Co. *v.* Dunn, 78 Ill. 197; Correll *v.* B., C. R. & N. R. R. Co., 38 Iowa, 120.

Williams and Wife

v.

Texas and Pacific R. R. Co.

(*Advance Case, Texas. October* 23, 1883.)

In an action by the parents of a deceased child to recover damages for his death which was alleged to have been occasioned by a moving car upon which deceasad was attempting to leap, the declaration averred that the moving car in question was detached from the engine, and that there was no person on it at the time when the injury occurred, but it was not distinctly stated, nor did it sufficiently appear from the pleadings, that this act of negligence (if negligence under the facts set forth) was the direct cause of the injury; nor that if any one had been on the car the accident could have been prevented; nor that after the child attempted to leap upon the moving car that any care or diligence on appellee's part could have saved his life; but it did clearly appear that the parents of the child knew the danger to which the child was exposed. *Held*, a demurrer was properly sustained. *Held* further, where the pleadings show that the parents of the child were aware of the danger, and it was their fault that such a child of tender years was so exposed thereto, while the child's negligence, or even that of his parents,

could not be charged against him, yet in a suit by the surviving parents a different rule governs.

Where the parents are negligent, and contribute to the injury by exposing a child of tender years to danger of which they were aware, *held* they cannot recover.

APPEAL from Wood County.

Hart & Buchanan and Giles & Cane for appellants.

James Turner and C. B. Stuart, Jr. for appellee.

This suit was filed in the District Court of Wood county to recover damages against the appellee, the Texas and Pacific R. R. Co. Appellants allege in their petition that on December 17, 1880, their son, George Demont Williams, who was only eight years old, was killed by the moving cars of appellee in the town of Mineola, in said Wood county, while playing on the track, or platform, of said appellee's road; that appellee had constructed a depot building and platform for receiving cotton, not connected with its passenger platform, in the immediate vicinity of the business part of said town; that appellee had agents, servants and watches at and around said platform, whose duty it was to look after and attend to the business of said company in said town; that appellee's said railway track is constructed within one or two feet of said cotton platform; that the same was alluring to children, who frequented said platform to play; that appellant's son, George Demont, in company with other children, on said 17th day of December, A. D. 1880, went upon said platform to play, and while there playing appellee's agents ran one of its cars, detached from any engine, in a negligent manner, without any brakeman or any one on it to manage and control the same, by said platform, and while said car was running by the said platform the said George Demont, in attempting to leap upon said car, fell under it and was killed thereby; that appellee's agents and servants saw said George Demont and other children playing upon said platform and railroad track, but made no effort to get, or drive them away; that said child was upon said platform without the knowledge or consent of appellants; that said cotton platform was dangerous for children to go upon or play at; that appellants had previously authorized and instructed the agents and employees of appellee to make their children go away from said platform if they should come about there, and to whip them if necessary for that purpose; that said George Demont was of tender years and of insufficient capacity to understand the danger to which he was subjected.

A general demurrer and special exceptions to this petition were sustained, and the case brought upon on this appeal, presenting the single question, did the court err in sustaining the demurrer to the petition?

WEST, J.—Taken and considered together as a whole we have come to the conclusion that the District Court committed no error by its action in sustaining the exception and demurrer to the pleadings of the appellants as amended.

There is no averment in the amended petition that can be properly said to charge such negligence on the appellee, under the facts detailed, as would make it, under our previous rulings, responsible in damages to the appellants. There is an averment to the effect that the moving car was detached from the engine, and that there was no person on it at the time when the child was killed by it. But it is not distinctly stated, nor does it any where sufficiently appear from the pleadings, that this act of negligence of appellee, if indeed, under the special facts set up in the case, it can be called negligence to have no one on the moving car in question, was the direct cause of the injury. It is not alleged that the presence of some one on the car would have prevented the accident. It is nowhere alleged, or pretended, that after the child attempted the fatal leap that any care or diligence on the part of the appellee could have saved his life.

On the contrary it is shown, with reasonable clearness and certainty from the pleadings of appellants, that the appellants were informed, and had been made aware of the danger that attended the playing of children on the platform in question, and that they had information, at the very least, that children did frequently expose themselves to danger there.

Their pleadings disclosed the fact that under the circumstances it was dangerous for children of tender years, to so expose themselves. It was, as appears from their own version of the matter, the fault of the appellants that so young a child as the deceased was permitted or allowed to be exposed to such danger, and though, owing to its tender years, negligence in this respect, of himself, or even of his parents, could not be charged against him (G., H. & H. Ry. Co. *v.* Moore, 1 Texas Law Review, 145), yet when the suit is brought, as in this case, by the surving parents, very properly, in considering the question of recovery, a different rule will govern.

In this case this negligence of appellants, which could not be imputed to the child, will be considered in quite a different light when the suit is brought for the benefit of appellants. They, it appears, were guilty of negligence in exposing the child to danger; to this extent they contributed to the fatal result, and under the circumstance alleged, being in fault, they cannot recover.

There is no pretense that the injury was inflicted designedly or wilfully by the appellee, or that it resulted directly from any negligence, or want of foresight or proper care on the part of the appellee.

Under all the facts, as set forth, we are of the opinion that

neither the child, if living, nor its surviving parents, can maintain this action.

This case differs widely from the two cases of Evansick v. G., C. & S. F. Ry. Co. (57 Tex. 123 and 126), and of the T. & P. Ry.Co. v. O'Donnell (58 Tex. 28).

It is also very different in its features from the case of the H. & T. C. Ry. Co. v. Simpson (2 Texas Law Review, 167), and from the case of the G., H. & H. Ry. Co. v. Moore (1 Texas Law Review, 145). All these cases, and as many others as have been accessible to us, have been examined with great care. Cooley on Torts, pp. 660, 663, and notes.

We are of opinion that there is no error in the judgment, and that it ought to be affirmed.

Affirmed.

Children Injured while Trespassing.—As to the measure of duty required on the part of a railroad company to a child trespassing on its grounds and injured in consequence, see Cauley v. P., C. & St. L. R. Co., 2 Am. & Eng. R. R. Cas. 4; Chicago & N. W. R. Co. v. Smith, 4 Am. & Eng. R. R. Cas. 535; Nagel v Missouri Pac. R. R. Co., 10 Am. & Eng. R. R. Cas. 693; Atchison & Nebraska, R. R. Co. v. Bailey, 10 Am. & Eng. R. R. Cas. 742; Baltimore & Ohio R. R. Co. v. Schwindling, 8 Am. & Eng. R. R. Cas. 544, and note; Dowling v. N. Y. Central & H. R. R. Co., 12 Am. & Eng. R. R. Cas. 73.

Negligence of Parent Prevents Recovery by him for Injury to Child.—Where a parent has been guilty of contributory negligence in subjecting his child to danger, he is precluded from recovering damages in case of the injury or death of the child. Glassey v. Railroad, 57 Pa. St. 172; Pittsburg R. R. v. Pearson, 72 Pa. St. 169; Bellefontaine R. R. v. Snyder, 14 Ohio St. 670; Jeffersonville R. R. v. Bowen, 49 Ind. 154; Hunt v. Greer, 72 Ill. 393; Albertson v. Keokuk & Des Moines Ry. Co., 48 Iowa. 292; Cauley v. Pitts. C. & St. L. R. R. Co., 2. Am. & Eng. R. R. Cas. 4; Smith v. Hestonville, M. & F. R. Co., 2 Am. & Eng. R. R. Cas. 12; Smith v. Atchison, T. & S. F. R. Co., 4 Am. & Eng. R. R. Cas. 554; St. Louis, I. M. & S. R. Co. v. Freeman, 4 Am. & Eng. R. R. Cas. 608; Meeks v. So. Pac. R. R. Co., 8 Am, & Eng. R. R. Cas. 314; Johnson v. Chicago & N. Y. R. Co., 8 Am. & Eng. R.R. Cas. 471; Frick v. St. L., K. C. &. N. R. Co., 10 Am. & Eng. R. R. Cas. 776.

Negligence of Parent cannot be Imputed to Child.—In an action by a child to recover damages for injuries done him, the negligence of his parents cannot be imputed to him so as to bar recovery. Singleton v. E. C. R. R. Co., 7 C. B. (N. S.) 287; Waite v. N. E. R. R. 2 B. & E., 749; Morgan v. Atherton, L. R. 1 Exch. 239; Brown v. Railroad, 58 Me. 384; Leslie v. Lewiston, 62 Me. 468; Holly v. Gas Co., 8 Gray, 123; Callahan v. Bean, 9 Allen, 401; Wright v. Street R. R. 4 Allen, 283 (but see Lynch v. Smith, 104 Mass. 52); Mulligan v. Curtis, 100 Mass., 512; Hartfield v. Roper, 21 Wend. 615; Lehman v. Brooklyn, 29 Barb. 234; Mangum v. Brooklyn City R. R., 36 Barb. 529; Bank v. Broadway R. R., 49 Barb. 529; Flynn v. Hatton, 4 Daly, 552; s. c., 43 How. Pr. 333; Morrison v. Railroad, 56 N. Y. 302; Ross v. Innis, 26 Ill. 259; Chicago v. Starr, 42 Ill. 174; Pitts., F. W. & C. R. R. Co. v. Vining, 27 Ind. 513; L. & I. R. R. v. Huffman, 28 Ind. 287; Jeffersonville R. R. v. Bowen, 40 Ind. 545; Hathaway v. Railroad, 46 Ind. 25; Ewen v. Railroad, 38 Wis. 613; Brown v. Maxwell, 6 Hul. 92; Munger v. Tonawanda R. R. Co., 4 N. Y. 349: Willetts v. Buffalo, etc., R. R. Co., 14 Barb. 585; Burke v. Broadway & Third Ave. R. R. Co., 43 How. Pr. 333; Bulger v. Albany R. R. Co., 42 N. Y. 459;

Louisville P. C. Co. *v.* Murphy, 9 Bush, 522; Bannon *v.* Balt. & O. R.R. Co., 24 Md. 108; Stillson *v.* Hannibal, etc., R. R. Co., 67 Mo. 671; Chicago R. R. Co. *v.* Stratton, 78 Ill. 88; Galveston, H. & H. R. Co. *v.* Moore, 10 Am. & Eng. R. R. Cas. 745.

There are, however, authorities to the contrary. Daley *v.* Norwich R. R., 26 Conn. 598; Boland *v.* Miss. R. R., 36 Mo. 490; Whirley *v.* Whittemore, 1 Head. 620; Robinson *v.* Cone, 22 Vt. 213; Bellefontaine R. R. Co. *v.* Snyder, 18 Ohio St. 399; s. c., 24 Ohio St. 670; Norfolk, etc., R. R. *v.* Ormsby, 27 Gratt. 455; Walters *v.* Railroad, 41 Iowa, 61; Isabel *v.* Railroad, 60 Mo. 475. Fitzgerald *v.* St. Paul, etc., R. Co., 8 Am. & Eng. R. R. Cas. 310.

McGeary
v.
Eastern R. R. Co.

(135 *Massachusetts Reports*, 363.)

In an action for personal injuries sustained by a child eighteen months old, by being run over by a locomotive engine, there was evidence that the plaintiff lived with his mother in a house near a railroad track, with no fence between the house and track; that the mother and child were in a room, the door of which was open and faced the track; that the mother placed the child in a chair, gave it something to eat, and, with her back to the child, began to wash the floor of the room; that about two minutes afterwards, hearing a noise, she went to the door and saw the child by the track, he having attempted to cross it when struck by the locomotive engine. *Held*, that whether the mother exercised due care in looking after the child was a question of fact for the jury.

Tort for personal injuries. At the trial in the Superior Court, before Wilkinson, J., there was evidence tending to prove the following facts:

The plaintiff, a child eighteen months of age, resided with his parents in a house by the side of the defendant's railroad, in Peabody, the access from the house to the street being by the side of the railroad track, the front door of the house being about thirty feet from the street and twenty feet from the track. The house, street and track were all on the same grade, and there was no fence or other barrier between the track and the house. The defendant's passenger station was on the opposite side of the track from the house, and about one hundred feet from the street. The defendant had kept open for public travel all the premises between the station and the street, including the track by the house, and by its acts had invited public travel thereon and thereover. For the purpose of accommodating this travel, the defendant had planked between the rails of the track a distance of about eight feet from the street in a line with the house. The plaintiff's father was a laboring man, his family consisting of himself, wife and three children,

and they occupied two rooms, the door of the kitchen, which was their living room, opening towards the track. About five o'clock in the afternoon of July 7, 1881, the mother of the plaintiff proceeded to wash the floor of the kitchen, the outer door of which was open. She placed the plaintiff in a chair, and gave him a piece of bread and butter, and continued her work. In washing the floor, her back or side was turned to the plaintiff, and it had not been so turned more than about two minutes when she heard a noise, rushed to the door, and saw the plaintiff on the ground by the side of the track. He was attempting to cross the track when he was struck by the wheel of a locomotive engine, and one of his legs was cut off. The place where he was struck was about four feet from the line of the street, on the part of the track which had been planked as above stated, and the train was just coming to a stop at the station when the accident happened, and stopped a few feet beyond where the plaintiff was struck. The plaintiff was a quiet and obedient boy.

The judge ruled that the evidence above stated was not sufficient to prove due care on the part of the plaintiff, or those having him in charge; ordered a verdict for the defendant; and reported the case for the determination of this court. If such ruling and order were correct, judgment was to be entered on the verdict; otherwise, the verdict to be set aside, and the case to stand for trial.

W. D. Northend for the plaintiff.

J. A. Gillis for the defendant.

W. Allen, J.—In the opinion of the majority of the court, the question whether it appeared from the evidence offered that the plaintiff escaped from the house and custody of his mother without her fault,—whether she exercised due care to prevent him from escaping,—was a material question of fact, to be determined by the judgment of the jury, and not a question of law, to be decided by the court. O'Connor *v.* Boston & Lowell R. R. supra, and cases there cited.

Verdict set aside and case to stand for trial.

Duty of Parent as to Care of Child.—A parent is bound to take proper care of a child so as to guard it against being run over at railroad crossings. The measure of duty varies with the age of the child, the station of the parent in life and other attendant circumstances. Walters *v.* Chicago, R. I. & P. R. Co., 41 Iowa, 71; Pittsburgh, Ft. W. & C. R. Co. *v.* Vining, 27 Ind. 513; Isabel *v.* Hannibal & St. Joe R. Co., 60 Mo. 475; Kay *v.* Pennsylvania R. R. Co., 65 Pa. St. 269.

Contributory Negligence Per Se.—Some acts of carelessness on the part of parents in allowing their children to stray at large are so gross that they have been pronounced negligence per se. The jury is not called to pass upon such acts. Jeffersonville, etc., R. R. Co. *v.* Bowen, 49 Ind. 154; Stillson *v.* Hannibal & St. Jo. R. Co., 67 Mo. 671; Morrison *v.* Erie R. R. Co., 56 N. Y. 302; Government St. R. R. Co. *v.* Hanlon, 53 Ala. 70; Bellefontaine R. R. Co. *v.* Snyder, 24 Ohio St. 670; Evansville, etc., R. Co. *v.* Wolf, 59 Ind. 89;

Toledo, W. & W. R. Co. *v.* Grable, 88 Ill. 441; Wright *v.* Walden & M. R. Co., 4 Allen 283; Glassey *v.* Hestonville, M. & F. R. Co., 57 Pa. St. 172; Cauley *v.* Pittsburgh, etc., R. R. Co., 2 Am. & Eng. R. R. Cas. 4; Smith *v.* Hestonville, M. & F. R. Co., 2 Am. & Eng. R. R. Cas. 12; St Louis, Iron Mt. & S. R. Co. *v.* Freeman., 4 Am. & Eng. R. R. Cas. 608.

Contributory Negligence is for Jury.—Ordinarily the question whether or not a parent has been negligent in allowing his or her child to run at large is a question for the jury. Ihl *v.* Forty-Second St. or Grand St. F. R. Co., 47 N. Y. 307; Fallon *v.* Central Park N. & E. R. R. Co., 64 N. Y. 13; Prendergast *v.* New York Central, etc., R. R. Co., 58 N. Y. 652; Pennsylvania R. Co. *v.* Lewis et al, 79 Pa. St. 33; Pittsburgh, A. & M. R. R. Co. *v.* Pearson, 72 Pa. St. 169; Phila. & Reading R. R. Co. *v.* Long, 75 Pa. St. 257; Ferris *v.* Cass Avenue, etc., R. R. Co., 1 Am. & Eng. R. R. Cas. 622; Lovett *v.* Salem & D. R. Co., 9 Allen, 557; Schierhold *v.* North Beach, etc., R. Co., 40 Cal. 447; Johnson *v.* Chicago & N. W. R. Co., 1 Am. & Eng. R. R. Cas. 155; Smith *v.* Atchison, T. & S. F. R. Co., 4 Am. & Eng. R. R. Cas. 554; Meeks *v.* Southern Pac. R. Co., 8 Am. & Eng. R. R. Cas. 314; Johnson *v.* Chicago & N. Y. R. Co., 8 Am. & Eng. R. R. Cas. 471; Frick *v.* St. Louis, K. C. & N. R. Co., 10 Am. & Eng. R. R. Cas. 776.

Attendants.—In many cases the question has arisen whether the attendant provided by the parent was herself of suitable age to care properly for the child. In some cases the courts have themselves decided this point affirmatively. Pittsburgh, Ft. W. & C. R. Co. *v.* Bumstead, 48 Ill. 221, Commonwealth *v.* Metropolitan R. Co., 107 Mass. 236; Chicago & Alton R. R. Co. *v.* Gregory, 58 Ill. 226.

In other cases the question is left to the jury. O'Flaherty *v.* Union R. R. Co., 45 Mo. 70; Pittsburgh, A. & M. R. R. Co. *v.* Pearson, 72 Pa. St. 169.

MARYLAND TO USE OF BACON et al.

v.

BALTIMORE AND POTOMAC R. R. Co.

(58 *Maryland Reports*, 482.)

A. and B. started on a dark night to walk up a mile and a half of railroad track a few minutes after they knew that an express train coming from a direction opposite to that in which they were walking was due. After walking a short time they met the train. The engine had a bright headlight, but there was no whistle blown or bell rung. B., who was walking ahead, saw the engine just as it was upon him and stepped out of the way. It struck A., however, killing him. In an action to recover damages for A.'s death *held*, that he had been guilty of such contributory negligence as precluded recovery.

APPEAL from the Court of Common Pleas.
Charles J. Bonaparte for the appellant.
Bernard Carter for the appellee.

ALVEY, J.—This suit was brought to recover damages for the death of George Bacon, a colored man, who was struck and killed

by an engine on the road of the defendant, about 10 o'clock at night of the 6th of September, 1879; the accident being alleged to have occurred by the negligence of the employees of the defendant.

At the trial in the court below, after all the testimony was in, both for plaintiff and defendant, prayers for instruction were offered by the plaintiff, but which were rejected; and the court, at the instance of the defendant, instructed the jury, "that the plaintiff was not entitled to recover, because the deceased directly contributed to cause his death;" and a verdict was rendered for the defendant accordingly. And the first and principal question is, whether this instruction was rightly given.

In actions like the present, to recover damages for personal injuries suffered by the alleged negligence of the defendant, it is incumbent upon the plaintiff to prove, first, that there was a neglect of duty by the defendant; and, second, that the injury sustained was the direct consequence of such neglect of duty. And in many cases, as in the present, a third question arises, and that is, whether the party killed or injured was so far to blame, as to have directly contributed, by his own negligence or want of caution, to produce the injury complained of. This being matter of defence, the onus of proof in respect to it is properly on the defendant. But it is not unfrequently the case, that material defensive facts are disclosed by the testimony adduced on the part of the plaintiff, and where such is the case, and the evidence thus adduced by the plaintiff clearly establishes the fact of contributory negligence on the part of the party killed or injured, there is really nothing to be left to the jury to find. For while it is perfectly true, that where the plaintiff adduces evidence which, if uncontradicted, would justify and sustain a verdict, no amount of contradictory evidence, however strong, will justify the court in withdrawing the case from the jury; yet, if it be proved, as part of the plaintiff's case, or if it be otherwise proved and not controverted or denied by the plaintiff, that the party injured or killed was clearly guilty of negligence in the occurrence of the accident, and that such accident would not have occurred but for the negligence of the party injured directly contributing thereto, in such case, the defendant is entitled to have the jury instructed that their verdict must be for the defendant. The facts are taken as established, and the question then becomes one of law for the court, to be passed upon and decided as upon a demurrer to evidence. There is no office to be performed by the jury unless there is a contest in regard to the material facts involved in the issue or question to be decided, and if the facts, sufficient in themselves to establish clearly the contributory negligence on the part of the party injured, be either admitted or shown in proof by the plaintiff while attempting to prove negligence on the part of the

defendant, the court is well justified in acting upon such proof as true, and in directing the jury accordingly. As illustrative of this, we may take the example given of the application of the rule by Lord Chancellor Cairns, in the case of the Dublin, Wicklow & Wexford R. Co. *v.* Slattery, 3 Appeal Cas., Ho. Lords, 1166, to the effect that if a train, which ought to give signal by whistle when approaching a road crossing, or passing a station, were to pass without giving such signal, and a party were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, the Judge ought to instruct the jury that it was the folly and recklessness of the party himself, and not the carelessness of the company, which caused his death. In such case, says the Chanceller, "the jury should not be allowed to connect the carelessness in not whistling, with the accident to the man who rushed, with his eyes open, on his own destruction."

In this case the facts are few, and from their nature it requires no long process of deduction to enable us to arrive at a definite and certain conclusion from them. The proof on the part of the plaintiff shows clearly that Bacon, the deceased, had lived for several years immediately on the roadside, and was well acquainted with the running of the trains. That he, with his companion Williams, on the evening of the accident, some time between 6 and 7 o'clock, left his house and went down the railroad to a store, immediately on the road side, a distance of something over a mile and a half from his house. He remained at this store until about 10 o'clock, when he, with his companion, started to return to his house, walking up the track of the railroad. The train which caused the death of Bacon was a regular express train from Baltimore to Washington; and the schedule time for leaving Baltimore was 9 o'clock at night, or 9.05 by Philadelphia time, though it was a little late that night in leaving Baltimore; and, according to the testimony on the part of the plaintiff, it was a few minutes late when it reached Seabrook station, near which the accident occurred; though, according to the testimony on the part of the defendant, the time had been fully made up before the train reached that station. While at the store neither Bacon nor Williams kept any lookout for the passage of the train, though they knew that such train was to pass, and of the time it was due at Seabrook station. Just before leaving the store for home, Bacon took out his watch, and informed himself of the time, according to his time-piece, and observed to Williams, his companion, that "there is a train comes along—a very swift running train—a through train, and does not stop; and he didn't like to be on the road at that time of night, as it was very dark." The witness further says, that the deceased "looked at his watch to see if the train had passed; he said it was time the train ought to have

passed, and at that time it ought to have been in Washington." Bacon, at the same time, remarked that the train was due at Seabrook station at 10 o'clock, and that it was then four or five minutes after 10 o'clock; he thought it ought to have passed. And thereupon the parties started to walk up the railroad track to Bacon's house, instead of taking what was known as the "Telegraph road," running in the same direction, though, by that road, the distance was a little greater. The parties had proceeded up the track of the railroad a distance of nearly a mile, to a point near the crossing of a county road, a little south of the Seabrook station, when and where the accident occurred. The night was dark, but the express train was approaching from the direction of Baltimore, bound to Washington, thus meeting the parties walking on the track, and the engine carried the ordinary headlight. From a point a considerable distance south of the place where the accident occurred, the railroad is entirely straight in the direction of Baltimore for a distance of more than three miles; and there is no such grade in the track as would obstruct the view or prevent parties meeting the approaching train from seeing it at a considerable distance before reaching the point where the accident occurred. At the time of the accident Bacon was walking some strides ahead of his companion Williams, and the latter saw the approaching train in time to leave the track before the train came up to him. He says, however, that he did not observe the train until just before he stepped aside to get out of the way. Both he and the widow of the deceased testified that they heard no whistle sounded at the road crossing near Seabrook station; but it is not pretended that the parties were attempting to cross the road, or that they were at the crossing at the time of the accident. The only act of neglect proved against the defendant by the evidence adduced on the part of the plaintiff was the failure to sound the whistle at the crossing of the county road; and that proof was strongly controverted by the proof adduced on the part of the defendant. But, as the case is now presented on the instruction of the court below, we are not to consider the conflicting or opposing evidence produced by the defendant. The facts we have stated are those established by the plaintiff's witnesses, and such as are not in any manner controverted by the plaintiff.

Now, as stated by the witnesses, the night was dark, and the parties assumed the risk of walking up the railroad track for a distance of over a mile and a half, knowing that it was about the time for the passage of an express train, and without knowing whether or not such train had in fact passed. It is true, they may have supposed that because a few minutes had elapsed after the precise time when the train was due, according to the time kept by themselves, that it had in fact passed. But that was a mere surmise, founded upon no other fact than the few minutes time

that was supposed to have elapsed from the time when the train was regularly due. They had heard no train pass that they took to be the express train, though they had been for about three hours at the store immediately on the roadside; and it is the common knowledge of every one at all acquainted with the running of railroad trains, that it is no unusual thing for them to be a few minutes behind schedule time in passing way-stations. It was an act of peril, and therefore an act of negligence, under the circumstances of the case, to undertake to walk such a distance on the railroad track. And if there was difficulty in escaping from the track, by reason of embankments, cuts or ditches, along the road, the peril and the negligence, in venturing the walk, were only the greater. The night being dark, they must have known that they could not depend for their safety upon being seen by those in charge of the train, beyond the reflection of the headlight They knew perfectly well that their safety depended alone upon the use of their senses and the exercise of a proper degree of caution. It is difficult to suppose that they did not see the approaching train, with its glaring headlight confronting them, in time to enable them to step from the track. If the deceased did see or hear the approaching train in time, and failed to get out of the way, he was certainly guilty of the grossest negligence; and if he did not see or hear the approaching train, it must have been because he did not use his senses for his protection, and he was therefore guilty of negligence, and that negligence directly contributed to the cause of his death. And upon either of these suppositions (and there can be no other upon the proof offered by the plaintiff), it was quite immaterial that the whistle was not sounded as the train approached the crossing; for conceding that omission to have been negligence on the part of the defendant in respect to the deceased, yet, if the latter saw or heard the approaching train in time to get from the track, the sounding of the whistle would have added nothing to the admonition to escape; and if he did not see or hear the approach of the train, his own negligence in placing himself in such a perilous situation, and the manifest want of care and attention in the use of his senses to guard himself against the perils that he had voluntarily incurred, so directly contributed to and brought about the occurrence of the accident, that all right of action for and in respect of the alleged negligence of the defendant is completely precluded.

Repeating here substantially what has been said and held in previous cases, the deceased was at the time of the accident on the private right of way of the defendant, where he had no right to be. But, aside from this fact, the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking proper precautions for his own safety. Negligence of the defendant's employees in these

particulars, was no excuse for negligence on his part. He was bound to listen and to look while walking along the railroad track, in order to avoid an approaching train, and not to walk carelessly into a place of possible danger. Had he used his senses, he could not have failed both to hear and to see the train which was approaching; and having failed to observe the proper precautions, there is no right of action against the defendant for the consequences of the accident N. C. R. Co. *v.* Burns, 54 Md. 113; B. & P. R. Co. *v.* Stansbury, Id. 648; Railroad Co. *v.* Houston, 95 U. S. 702.

There was some objection made to the form of the instruction given; but while the form of the instruction would have been more appropriate, if it had directed the jury that upon the case made by the plaintiff, or upon the undisputed facts in the case, there was no ground of action shown, and therefore their verdict must be for the defendant; yet when this court can plainly see that there is no ground for the action, or no possible right of recovery, it will not reverse the judgment upon the mere form of the instruction that has led to a right result. The judgment must be affirmed.

Judgment affirmed.

Persons Walking on Track are Trespassers and are Guilty of Contributory Negligence.—Persons walking upon the track of a railroad company are trespassers, and are generally considered to be guilty of such negligence as to preclude the recovery of damages in case of their injury or death. Louisville, etc., R. R. Co. *v.* Cooper, 6 Am. & Eng. R. R. Cas. 5; Teunenbroock *v.* Southern Pac. R. Co., 6 Am. & Eng. R. R.Cas. 8; Houston & T. C. R. Co. *v.* Sympkins, 6 Am. & Eng. R. R. Cas. 11; Northern Central R. Co. *v.* State, 6 Am. & Eng. R. R. Cas. 66; McLaren *v.* Indianapolis, etc., R. Co. *v.* 8 Am. & Eng. R. R. Cas. 217; Parker *v.* Wilmington & W. R. Co., 8 Am. & Eng. R. R. Cas. 420; Yarnall *v.* St. L., K. C. & N. R. Co., 10 Am. & Eng. R. R. Cas. 726; Baltimore & Ohio R. R. Co. *v.* Depew, 12 Am. & Eng. R. R. Cas. 64; Houston & T. C. R. Co. *v.* Richards, 13 Am. & Eng. R. R. Cas. 70; Terre Haute, etc., R. R. Co. *v.* Graham, 12 Am. & Eng. R. R. Cas. 77; Louisville & N. R. Co. *v.* Watkins, 12 Am. & Eng. R. R. Cas. 89.

The authorities on this point are all collected in note to Houston & T. C. R. Co. *v.* Sympkins, 6 Am. & Eng. R. R. Cas. 11.

CARTER
v.
COLUMBIA AND GREENVILLE R. R. CO.

(19 *South Carolina Reports*, 20.)

The defendant is entitled to a non-suit where there is a total failure of evidence to sustain the plaintiff's case; but if there is any testimony, the force and effect of which must be determined, the case should go to the jury.

In action for damages for the negligent killing of a man, a motion for non-

suit upon the ground that the evidence adduced showed contributory negligence by the deceased, cannot be granted.

Negligence is the absence of due care, and must be proved by the party alleging it.

A railroad company is not liable in damages for the death of a man caused by the explosion of a torpedo with which he intermeddled while walking on the railroad track, and which had been placed there by the company as a danger signal to approaching trains.

A proposition charged by the circuit judge may be made a ground of exception, but a failure to charge can be assigned as error only when a request so to charge is made and refused.

In refusing to charge that a man who walks upon a railroad track, except at a road crossing, does so at his peril, the circuit judge committed no error.

Nor was there error in refusing to charge "that if the deceased was upon the track of the defendant without lawful authority, and using it for his own convenience, he was a trespasser, and that the company was under no obligation to take precautions against possible injuries to trespassers."

Where there is negligence on the part of the defendant, if the deceased, by the exercise of ordinary care, could have avoided the injury, and did not, he is the author of his own injury and cannot recover.

The judge is not called upon to separate a request to charge into parts, charging such as are sound, and rejecting such as are unsound. He may take it and consider it as a whole.

Contributory negligence is a matter of defence, and the burden of proving it is with the defendant.

In refusing to charge that, if the jury believed that the accident was caused by the effort of the deceased to open the torpedo which he found upon the railroad track, the verdict must be for defendant, the circuit judge committed no error, as such a charge would have taken from the jury a matter which was for their determination, to wit: whether the alleged act amounted to contributory negligence.

Action by Gibbes Carter, as administrator of Christopher Carter, deceased, commenced in February, 1882. The opinion sufficiently states the case.

Messrs. Conner & Cheves for appellants.

The non-suit should have been granted. 13 N. Y. 9; Thomp. Carr. 168, 206, 215; 15 Wall. 524; 44 Penn. 375; 1 Thomp. Negl. 449; 11 East, 60; 10 Mees. & W. 546; 2 McMull. 405; 8 Rich. 126; 6 S. C. 83; 3 Com. B. (N. S.) 150; 8 Id. 570; 4 Hurlst. & N. 781; 14 Wall. 448; 22 Id. 120; 94 U. S. 284; 5 Rich. 443. The refusal of the first request was error. Gen. Stat. §§ 1518-20; 81 Penn. St. 366; 44 Id. 375; 31 Gratt. 812; 95 U. S. 697; 125 Mass. 75; 120 Id. 306; 58 Barb. 438; 41 N. Y. 530, 532; 66 Id. 247; 59 Penn. 129. As to the second request, counsel cited the same authorities.

Messrs. Abney & Abney, contra, cited 2 Bailey, 321; 3 S. C. 9; 7 S. C. 144; 16 S. C. 636; 19 Conn. 507; 100 U. S. 214; 83 Ill. 405; 9 Rich. 90.

Simpson, C. J.—The plaintiff's intestate, while walking on the track of defendant's railroad, picked up a small torpedo which he

saw lying on the track. While he was examining this instrument (the character of which it seems was wholly unknown to him) it exploded, causing his death almost instantly. This action was brought by the plaintiff, his administrator, to recover damages, for the benefit of himself and of his wife, the father and mother of the deceased. The basis of the action is negligence on the part of the defendant, and this is charged in the complaint as follows, to wit: "That defendant wrongfully, neglectfully and carelessly placed on their track an explosive and dangerous instrument, commonly called a torpedo, and wrongfully, neglectfully and defaultingly left the torpedo on the track," etc.

The testimony of the plaintiff showed that the torpedo had been placed on the track on the morning of November 5th, 1881, the day on which the accident occurred, as a danger signal to guard against collisions, and in accordance with the rules of the company prescribing and regulating such matters; that the deceased, with another person, who were on their way to Columbia from some point above, in order to save distance had left the highway, and was on the track at a point where, for years, all persons who desired to do so had been accustomed to walk the track or along a path on its margin; that at this point he discovered this torpedo, when he picked it up, saying to his companion, "We had better keep this, it might have money in it;" that the deceased had two axes upon his shoulder, and while his companion was looking the other way an explosion took place, the deceased falling with his head outside of the rail, and one of the axes just in front of him. The companion was unable to say whether the deceased was kneeling down examining the torpedo with his axe, or how or why the explosion took place.

Upon the close of this testimony the defendant moved for a nonsuit on the ground of want of evidence to sustain plaintiff's alleged case, because, first, there was no testimony to support the charge of negligence; and, second, even if there was, yet plaintiff's testimony showed contributory negligence by the deceased; and therefore, the alleged cause of action was wholly without foundation in evidence. This motion was refused, and the trial proceeded to a conclusion, the jury rendering a verdict for the plaintiff.

The defendant requested the presiding judge to charge certain legal propositions found below, which he declined, and the defendant has appealed, assigning error because the judge refused the motion for non-suit, and also declined to charge the propositions requested. These propositions were as follows:

1. "That the use of a railroad track is for its owners, and those acting under them, its employees; and, except at crossings where the public have a right of way, the man who walks upon a railroad track does so at his peril. If deceased was upon the track of the defendant without lawful authority and using it simply for his own

convenience, he was a trespasser, and the company was under no obligation to take precautions against possible injuries to trespassers.

2. "That to entitle the plaintiff to recover he must prove negligence in the defendant, and no want of ordinary care on the part of the deceased; and even when there is negligence on the part of the defendant, if the deceased, by the exercise of ordinary care, could have avoided injury, and did not, he is the author of his own wrong and cannot recover.

3. "That if the jury believe that the accident was caused by the effort of the deceased to open the torpedo, then he was the author of his own injury and cannot recover, and the verdict must be for the defendant."

The defendant also excepted "because his Honor did instruct the jury that 'want of due care upon the one side does not relieve the other;' and also 'if plaintiff exercised due care, and defendant did not, he is entitled to recover; if defendant exercised due care, and plaintiff did not, he is not entitled to recover,' and failed to instruct the jury that if there was mutual negligence the plaintiff could not recover.

2. "Because his Honor, in the final clause of his charge, in effect limited the jury to the two issues only, of negligence on the part of the defendant and no negligence on the part of the deceased on the one hand, and of no negligence upon the part of the defendant on the other, and did not instruct the jury that there was a third issue, and that if there was negligence by the defendant, but that, nevertheless, the deceased, by the exercise of ordinary care, could have avoided the injury, then that the plaintiff was not entitled to recover."

We will consider first the exceptions founded upon the refusal of his Honor to grant the motion of non-suit. A non-suit is not only proper but it is the legal right of the defendant where there is a total failure of evidence to sustain the plaintiff's case, as alleged in the complaint. If the plaintiff has introduced any testimony, the force and effect of which has to be considered, then the case must go to the jury, because under our system of judicature the jury is the only constitutional tribunal authorized to weigh testimony. But in every case there may be a preliminary question, which is addressed to the judge, to wit: Has any testimony been introduced bearing upon the points at issue? If so, there is nothing left for the judge but the legal points involved, and the facts must be submitted to the jury; if not, however, a non-suit is proper. Holley *v.* Walker, 7 S. C. 144; Miller *v.* Bolt, 16 S. C. 636; Boykin *v.* Watts, 6 S. C. 83.

Now the gist of this action is negligence on the part of the defendant. This was alleged in the complaint, and to entitle the plaintiff to go to the jury on that question it was necessary before the defence was put to proof, for the plaintiff to make out at least

a prima facie showing. The defendant denies, first, that such showing was made; and, second, that if made it was overthrown by the additional testimony of the plaintiff proving contributory negligence by the deceased.

We do not think that this second ground could have been considered by the judge. That involved a question of fact, the truth of which depended upon the force and effect of the evidence touching that question, and before the judge could have reached the conclusion that contributory negligence by the deceased appeared, he would have been compelled not to consider simply whether any testimony had been offered upon that subject, but whether the fact had been made out that the testimony was sufficient in its force and effect to establish it. This would have been invading the province of the jury, and therefore unwarranted in this State under our constitution. Elsewhere the cases are conflicting.

This exception then must stand or fall upon the first ground. Was there a total failure by plaintiff to make out a prima facie case of negligence by defendant? It may be said in general terms that negligence, legally understood, is the "absence of due care." The presiding judge thus defined it below, and the doctrine is so familiar that this definition may be adopted without citing authorities. In a special case it is the absence of such care as the business or matter producing the injury may demand, and the party in charge bound to bestow, out of due regard to the rights of others. This being a material fact, indeed, the essential fact in all actions like the present, it must be proved affirmatively by the plaintiff.

Now let us examine the evidence introduced by the plaintiff in this case, under the light of these principles, with the view to determine whether there was any testimony bearing upon this point. The testimony offered by the plaintiff has been briefly stated above, and there is no controversy as to the points to which it was directed. It was intended to show, and did show, that the torpedo was placed on the railroad track by the defendant; it showed that this railroad track was the exclusive property of the defendant; that this torpedo was placed at the point where the deceased discovered it, as a danger signal, under established regulations, made deliberately by the company; that the deceased, while travelling through the country, made use of the track as a road upon which to walk, not by any express permission of defendant, but by its sufferance, arising from the fact that others had for years been in the habit of thus using it; that he found this torpedo, of the nature of which he was entirely ignorant, loose upon the track; that he picked it up and examined it, saying that "there might be money in it." His mode of examination is unknown, whether by striking it with an axe or otherwise, but it exploded and caused his death.

This is the testimony as admitted by both sides. Is any portion of it pertinent to the issue of negligence? Or do the facts thus

proved evolve, as a legal conclusion, this negligence? There is certainly no affirmative testimony that there was an absence of due care by the defendant in placing this torpedo upon its own track. There was none directed to the point, that due care required the company to place it at one point more than another, or that it should be left at the one side more than another, or loose upon the track, so far as outsiders were concerned. The defendant did nothing but place a torpedo upon its track, and, as it appears, for a commendable purpose. We do not find a particle of affirmative testimony reported in the "Case" tending to show that this was done without due care. The remaining testimony was intended to show what part the unfortunate deceased took, and it has no direct reference to the negligence of the defendant.

Now take the facts as a whole on the plaintiff's showing, and should negligence by defendant follow prima facie as a legal conclusion therefrom, independent of any direct testimony upon this question? We think not. The railroad track belonged to the defendant; it certainly had the right to take every reasonable precaution to prevent collisions. There was no evidence that the torpedo was extraordinarily explosive; no evidence that an accident had ever occurred before in the use of such instruments; no evidence that the company might have anticipated a fatal result like this; no evidence that the torpedo was so explosive and so dangerous as reasonably to require of the defendant a notice to the public that it was being used; no evidence that the deceased had been authorized by the company to make use of its track as a highway, or that they positively knew that it was being so used. In fine, no evidence except the naked facts that the defendant had placed the torpedo upon its track for a good purpose, and that the deceased, by intermeddling with it for a bad purpose, had brought upon himself the terrible calamity which resulted from its explosion.

We think, that at the close of plaintiff's case below, there was a total want of testimony as to the defendant's negligence, the gist of the action, and, therefore, the non-suit should have been granted; and, in such case, under the ruling of Sampson & Wyatt *v.* Singer Manufacturing Co., 5 S. C. 465, and Willis *v.* Knox, 5 S. C. 476, a new trial is proper.

As to the two last exceptions in which error is assigned, because the presiding judge failed to charge that there was a third class, in addition to the two presented by him to the jury, to wit, a class where there is mutual negligence. We do not feel at liberty to consider these exceptions, because the proposition insisted upon, though perhaps sound as a legal principle, was not brought to the attention of the judge. A proposition charged by the judge may be made the ground of exception, but a failure to charge can only be made so when a request is made, and it is refused by the judge. Abrahams *v.* Kelly & Barrett, 2 S. C. 238.

The last matter to be considered is, the refusal of his Honor to charge the three propositions requested by the defendant, and found above. We do not think that the refusal of the judge to charge these propositions as stated, was such error as to constitute substantial ground for exception. No doubt that the use of a railroad track is for its owners, and those acting under them, except at crossings, where the public have a right of way, as stated in the first part of the first request. Mulherrin *v.* Delaware, etc., R. R. Co., 81 Pa. St. 366; Philadelphia & Reading R. R. Co. *v.* Hummell, 44 Pa. St. 375; 1 Thomp. Negl. 457. But it does not follow universally, and in every case, that a man who walks upon a railroad track, does so at his peril, as to all dangers which he may encounter and under all circumstances.

As an illustration: Suppose in this instance, the defendant, knowing that its track was being trespassed upon by parties unauthorizedly appropriating it as a track or road to walk upon, and to break up this use, had placed a dangerous explosive instrument thereon, likely to explode from mere contact, which was concealed from view, with no notice or advertisement to the public of the facts, and a traveller, though technically a trespasser, had been injured thereby, could it be claimed as a legal proposition that, under such circumstances, the company would be exempt from liability? We think not.

So, too, although the second part of the request may have been good technical law, to wit: "That if the deceased was upon the track of the defendant without lawful authority, and using it for his own convenience, he was a trespasser, and the company were under no obligation to take precautions against possible injuries to trespassers;" yet this principle could not have shielded the defendant from such injury as may have been produced by its negligence, if any, in every case without exception. It would, no doubt, require a much stronger case to make out negligence as to a trespasser than is required in ordinary cases, but we have found no case which goes to the extent of declaring that a trespasser has no protection. 2 Thomp. Negl. 1162, in notis.

The general rule is, perhaps, as defendant requested, but it is subject to several modifications. It does not exempt from liability the owners of lands who permit pitfalls and obstructions to remain on them so near the highway that, when combined with the ordinary accidents of travel, they result in injury to travellers. There is a class, too, of cases, where such proprietors are held liable for injuries to children, although trespassing at the time, because, from the peculiar nature and open and exposed position of the dangerous defect or agent, the owners should reasonably anticipate such an injury. And there are other similar cases where the general doctrine above does not apply in full. 1 Thomp. Negl. 304, and the cases cited in the notes. In such cases the question of negli-

gence is still open, and it is for the jury. We think, therefore, it would have been error in the judge to have charged broadly, and without the proper qualification, the proposition requested.

Nor do we think the second request could have been charged in full. The latter portion is, no doubt, sound law, to wit: "That even where there is negligence on the part of the defendant, if the deceased, by the exercise of ordinary care, could have avoided the injury, and did not, he is the author of his own injury, and cannot recover." This is nothing more than the well-established principle, that where there is contributory negligence on the part of the injured party to the extent of its being one of the proximate causes of the injury, then the courts will not undertake to graduate or apportion the damages according to the contribution from either side, but will leave the matter as they find it. Gunter *v.* Graniteville Manufacturing Co., 15 S. C. 443, and the cases there cited.

If this had been a distinct request, made by itself, it would have been error to refuse it. In fact, as we read the charge in one portion, it was distinctly laid down, though, to some extent, subsequently modified, or rather left out. But the objection to the request is, that it incorporated several propositions, all of which could not be charged, and the rule is that the judge is not called upon to disintegrate the request and take it up in its several parts, charging such as are sound, and rejecting the unsound. On the contrary, he takes it as a whole, and considers it as a whole. Here, this request embraced, in addition to the one just discussed, the following also, to wit: That to entitle the plaintiff to recover, he must prove negligence in the defendants, and no want of ordinary care on the part of the deceased. In other words, that the plaintiff's cause of action rested in the first instance, not simply upon the negligence of the defendant, but also upon the exercise of due care upon the part of the deceased, and that the burden of proof, as to both of these elements, was upon the plaintiff.

It is a general rule that the burden of proof is upon the party who maintains the affirmative of the issue. In other words, he who asserts a fact necessary to sustain an action must prove it; and he who asserts one which is to bar the action must also prove it. Mr. Thompson, on Negligence, states that in applying this rule to actions where it is sought to recover for an injury on the ground of negligence, the authorities are not in accord. Generally, contributory negligence, on the part of the plaintiff, will bar a recovery, and it would seem, therefore, to be a matter of defence, and that it would devolve upon the defendant to prove it. 2 Thomp. Negl. 1175. While, as Mr. Thompson says, the decisions in the different States are not uniform upon this question, nor, indeed, upon many of the questions involved in this interesting subject, to wit, the liability of railroads and other companies for injuries, a

subject that is daily growing more and more important, yet the current of the decisions is strongest in favor of the proposition that contributory negligence is a matter of defence, and the burden of proving it is with the defendant. 2 Thomp. Negl. 1176–77, in notis.

The defendant excepts, lastly, because the judge declined to charge that, if the jury believed the accident was caused by the effort of the deceased to open the torpedo, then the verdict should be for the defendant. As we have already stated, where the plaintiff has contributed to the accident to the extent of furnishing a proximate cause thereof, the defendant is exempt from liability as matter of law, and the judge could so charge; but whether a particular fact, if proved, shall amount to such contribution, is a matter for the jury and not for the court. What is negligence is defined in the books, and is a question of law, and it is the same whether it comes from the defendant or the plaintiff; but whether it is proved to be present in a special case is a question of fact for the jury.

The law holds that the want of due care is negligence. This much the judge can legitimately charge, but whether a particular fact, if proved, shows the want of due care, is for the jury acting upon all the evidence introduced. The objection to the exception is that it requested the judge to decide the effect of a certain fact assumed to be proved upon the issue which was before the jury, and which issue under the law they alone could determine. Under this view we think the judge was not in error in declining to charge the proposition as stated.

For the reasons given, we think the non-suit should have been granted, and its refusal below, under the cases of Sampson & Wyatt v. Singer Manufacturing Co., 5 S. C. 465, and Willis v. Knox, 5 S. C. 476, supra, now rendering a new trial proper; to this end it is the judgment of this court that the judgment of the Circuit Court be reversed.

Louisville, New Albany and Chicago Ry. Co.

v.

Dunkin.

(*Advance Case, Indiana. December* 15, 1883.)

In an action brought against a railroad company to recover damages for personal injuries the jury found that the plaintiff got upon one of the defendants' trains while drunk and not as a passenger and was violently ejected

therefrom by the conductor while the train was in motion, whereby he was injured. The verdict was for the plaintiff.

Held, that there was evidence to support the verdict and that the same would not be disturbed.

APPEAL from the Owen Circuit Court.

Friedly, Pierson & Friedly for appellants.

Friess & Fowler for the appellee.

BICKNELL, C.—In this action the appellee claimed damages from the appellants for the loss of his right arm. The complaint alleged that the defendants' conductor wrongfully, wilfully and maliciously pushed the plaintiff off the platform of one of the defendants' cars while it was in motion, whereby the plaintiff was thrown under the car and one of its wheels passed over his right arm and crushed it so that it had to be cut off, to his damage $10,000.

The defendants answered by a general denial. The issue was tried by a jury who returned a verdict for the plaintiff for $500, and answered interrogatories as follows:

1. Was the plaintiff drunk when he went upon the defendants' train?

Ans. Yes.

2. Did the plaintiff go upon the defendants' train for the purpose of taking passage? and if yea, where was he going?

Ans. No.

3. Did he attempt to get off the train when it was in motion?

Ans. No.

4. Was he thrown from or put off the defendants' train by the conductor thereof? *Ans.* Yes.

5. Was he thrown or pushed from the defendants' train? if yea, by whom? *Ans.* Yes, by the conductor.

6. Was the train boy John D. Trimmer, an employee of the defendants at the time of the accident? *Ans.* No.

A motion by the defendants for a new trial was overruled. A motion for judgment for the defendants upon the answers to the interrogatories was overruled. A motion in arrest of judgment was overruled. Judgment was rendered on the verdict, and the defendants appealed.

There are several errors assigned, but only one of them is discussed in the appellants' brief, namely: Overruling the motion for a new trial. And only one of the reasons alleged for a new trial is discussed in the appellants' brief, namely, That the verdict is not sustained by sufficient evidence.

Upon this the appellants' counsel say: "While we know the rule of this court is that, it will not disturb the verdict of a jury, if the evidence tends to sustain it, yet there is so little evidence to support the verdict, that we feel it our duty even against precedents established, to insist," etc.

The plaintiff's statement as a witness, if believed, proved his case, and he was supported by the testimony of a witness, who swore that he saw a man have hold of one of plaintiff's arms and push him off the car and kick at him as he went off. Another witness swore: "The train passed me and I looked and plaintiff fell off the train, and I saw the foot of some one follow out after him, like kicking him." There was other testimony tending to show that there was nobody on the platform with the plaintiff, when he left the train except the conductor.

The plaintiff's testimony, if believed by the jury, strongly tends to sustain the verdict, in such a case the verdict cannot be disturbed because of conflicting testimony. Hall *v.* Stanley, 87 Ind. 219; The Lake Erie, etc., Co. *v.* Everett, 87 Ind. 229; Arnold *v.* Wilt, 87 Ind. 367; State ex rel. *v.* Wyle, 87 Ind. 396. Assignments of errors not discussed by counsel are waived. Byram *v.* Galbraith, 75 Ind. 134. Reasons alleged for a new trial but not discussed in appellants' brief are waived. Wright *v.* Abbott, 85 Ind. 154.

The judgment ought to be affirmed. Per curiam.

Judgment affirmed.

Expulsion of Trespassers on Trains.—As to the liability of a railroad company for the expulsion of trespassers from their trains or stations in a violent and unjustifiable manner by the servants of the company see Penna. Co. *v.* Toomey, 1 Am. & Eng. R. R. Cas. 461; Cauley *v.* P., C. & St. L. R. Co., 2 Am. & Eng. R. R. Cas. 4; s. c., 4 Am. & Eng. R. R. Cas. 533; Hoffman *v.* New York Central & H. R. R. Co., 4 Am. & Eng. R. R. Cas. 537; Marion *v.* Chicago, etc., R. Co., 8 Am. & Eng. R. R. Cas. 177; Johnson *v.* Chicago, etc., R. Co., 8 Am. & Eng. R. R. Cas. 206; Carter *v.* Louisville, etc., R. R. Co., 8 Am. & Eng. R. R. Cas. 347: Finney *v.* Northern Pac. R. Co., 12 Am. & Eng. R. R. Cas. 17.

DAVIS

v.

CHICAGO AND N. W. RY. CO.

(*Advance Case, Wisconsin. November* 20, 1883.)

Where the right of way of a railroad company has been in constant use by travellers on foot for more than twenty years, without objection from the company, it is for the jury to say whether the company acquiesced in such user. Such a user, while not establishing a public highway upon the company's right of way, would relieve the persons passing over the same from being treated as trespassers by the company.

There is a clear distinction between the care which a railroad company is bound to exercise towards mere trespassers and towards those who are on its right of way by the license of the company, and in case of a long and con-

stant user of such way the company and its servants are charged with notice of it, and cannot neglect precautions to prevent danger to persons travelling thereon. Wilful injury is not the only ground of liability in such a case.

The leaving of a boiler and pile-driver unattended for more than half an hour, in the condition shown by the evidence, was culpable negligence on the part of the servants of the company, and it was for the jury, and not the court, to say whether such negligence was the cause of the explosion, and whether leaving such boiler unattended in the vicinity of a place where they knew people would be passing, was a want of ordinary care towards them. Nor could the court say, as a matter of law, that the explosion was due to unforeseen causes, and would have happened had the man in charge remained in attendance.

A licensee assumes the risks incident to the business of the company whose way he uses; but if injury be caused by negligence of the company he may recover therefor.

The statute forbidding persons from walking along the track of a railroad has no bearing in a case of permissive user like this.

APPEAL from Circuit Court, Jefferson County.

I. W. & G. W. Bird for appellant, John H. Davis.

W. R. Vilas for respondent, Chicago & Northwestern Ry. Co.

TAYLOR, J.—The appellant brought this action to recover damages resulting to him from the explosion of a steam-boiler of the respondent company. The steam-boiler which exploded and caused the injury was used for working a pile-driver, and at the time was on a flat car on a side track on the right hand of the main line going north from the depot in the city of Fort Atkinson. About thirty-five minutes before the explosion took place, the men in charge of the steam-boiler and pile-driver left the same and went into the city to take their dinner. During this thirty-five minutes none of the employees of the respondent were in charge of the pile-driver or steam-boiler. When the employees in charge left, there was a strong fire in the fire-box, and as the proof tends to show plenty of water in the boiler, and according to the evidence of the engineer in charge the safety-valve was set so as to blow off steam at 110 pounds pressure.

The cause of the explosion was not very clearly shown on the trial, but there was evidence which strongly tended to show that the boiler was either originally made of brittle and imperfect iron, or that it had become so by use, and that the steam did not blow off under a pressure of 120 pounds, which all admit was a dangerous pressure. Upon the trial, and after all the evidence was in, the circuit judge directed a verdict for the defendant. This verdict was directed, as is stated by the learned counsel for the defendant, "upon the simple ground that the alleged negligence, which the appellant claimed the defendant was answerable for, was not a breach of any duty which the defendant owed to the appellant in the position in which the appellant had placed himself. The simple fact is that the plaintiff went upon the ground of the defendant

uninvited, and in pursuit of his own personal ends, and was there injured by the accidental explosion of a boiler belonging to the defendant, and rightfully being where it was." The location of the place where the accident took place is fully described in the bill of exceptions, and is briefly as follows: The defendant's track runs nearly north and south through the city of Fort Atkinson, and crosses the Rock river on a bridge running in the same direction. The depot is south of the bridge about 400 feet. It is claimed by the appellant that there are two public streets which cross the line of the railroad track, east and west, north of the depot and south of the bridge. The first street north of the depot is Milwaukee Street. About the existence of this street there is no contention. North of Milwaukee Street and south of the river, the appellant claims there is a public street crossing the defendant's track, in an east and west direction, called South Water Street. The defendant denies that this street crosses the track, but admits that it is an open public street east of the track.

The appellant claims that there is also a public street running north from South Water Street to the river, and that the defendant's track crosses this street in a northeasterly direction. The place where the pile-driver stood when the boiler exploded was within the limits of what the appellant claims is South Water Street; and if the street is a public street its entire width across the track, there is no doubt but that the pile-driver stood in that street. The appellant was about fifty feet north of the pile-driver and 500 feet north of the depot when the explosion took place; and counsel for the appellant claims that he was within the limits of the street he calls Lumber Street. The evidence shows that the right of way of the respondent was fenced on both sides thereof, from what is claimed to be the north side of South Water Street to the river, and on the west side again from the south side of what is claimed to be South Water Street in a southerly direction, leaving a space between the ends of the fence on the west side about the width of South Water Street. For a considerable distance north of the south line of what is called South Water Street, the right of way was filled with lumber piles on the east side and cordwood on the west side, leaving only room for two railroad tracks. The west track was the main track and the east one the side track, on which the pile-driver stood when the explosion took place. The lumber piles on the east side of the track extend across what is claimed to be South Water Street, except an opening of about eighteen feet near the south side of the line of said street. The respondent claims that this opening was a private crossing used by Wilcox, the owner of the lumber-yard, and was known as Wilcox crossing, and was not a public street in any sense; at all events, not exceeding in width the 18 feet which he designates as Wilcox crossing. Wilcox's lumber and timber piles extend north, along

the east side of the right of way, to within 50 feet of the river, occupying a great portion of the east part of the respondent's right of way. On the west side Wilcox's wood piles occupied the west part of the right of way about 40 or 50 feet north of the crossing.

The appellant claims that for twenty years or more—in fact, ever since the company built its bridge across the river—the public have constantly used the bridge to cross from the north to the south side of the river, and vice versa; and the right of way of the railroad south of the river, as far south as Milwaukee Street, as a travelled way from the bridge south to reach South Water and Milwaukee Streets; the place where the people travelled was between the side track and the main track; and that the respondent had full knowledge of the fact that such right of way had been and was so constantly used for foot travel; and that no protest or objection had been made by said company to the use of its right of way for that purpose. The evidence also shows that the day before the accident happened the respondent was repairing the bridge, and the trains from the north did not cross the bridge; the passengers and baggage were transferred across the bridge on a hand-car, or passed the bridge on foot, to the train on the south side of the river; that on the day the accident happened the train stopped for a few minutes on the north side, but finally passed over the bridge; some of the passengers got off on the north side and passed the bridge on foot; that the plaintiff, who was a hotel-keeper, came to defendant's depot to solicit passengers for his hotel, and seeing the train stop north of the river, and passengers alighting therefrom, and perhaps supposing the train would not cross, started north along the travelled track between the side and main track to meet the passengers from the train, and when about fifty feet north of the pile-driver, while walking along the said travelled path or track, the boiler exploded and he was injured.

It is said the ruling of the court below was that the plaintiff was either a trespasser on the defendant's right of way, or at best a mere licensee thereon, and could not, therefore, recover of the defendant company, unless he showed "that he was injured by the wilful misconduct of its servants or employees," and thereupon directed a verdict for the defendant.

The learned counsel of the appellant claim that the evidence tends to show—First, that the boiler and pile-driver, when it exploded and injured the appellant, was standing within the limits of a public street of the city of Fort Atkinson; second, that the appellant, when injured, was passing along a public street of said city; third, that if he was not in a public street when injured he was travelling along a beaten path between the railroad tracks, and not on the same, which had been used by the public for passing north and south over Rock river from Milwaukee Street south to a public street on the north side of the river; and that for twenty

years this way had been used by the public travelling on foot between said points with the knowledge and acquiescence of the railway company; fourth, that it was at least a want of ordinary care, if not gross negligence, on the part of the persons in charge of the pile-driver and steam-boiler, to leave it unattended for the space of more than half an hour in the place and in the condition it was immediately before and at the time the boiler exploded and caused the injury.

It is not seriously contended, on the part of the learned counsel for the respondent, that if the first two propositions are sustained by the evidence, or that if the evidence was such as would justify the finding of a verdict sustaining these propositions, then the ruling of the court directing a verdict for the respondent was error, and the judgment must be reversed. We think it would also be clear that the verdict was improperly ordered, if the evidence given on the trial showed that the appellant was in a public street of the city when the explosion took place. If that fact were proven there could be no charge made against the appellant that he was guilty of any fault which contributed to his injury, and, having a right to be upon one of the public streets of the city, the railway company was bound to use ordinary care, at least, to prevent an injury to him. And, as seen hereafter, we are very clear that the evidence tended to show that the persons in charge of the pile-driver and boiler were not in the exercise of ordinary care when the explosion took place.

We are not prepared to say that there is sufficient evidence to sustain a verdict finding that the appellant was within a public street of the city when he was injured; and we would be unwilling to reverse the ruling of the circuit judge upon this point alone. Upon the second point, that the pile-driver and boiler were within the limits of a public street at the time of the explosion, we are more in doubt. But as we have concluded the verdict must be set aside upon other grounds, we do not deem it necessary to say anything more than this. It seems to us, after a careful reading of the evidence, there is proof in the case which might sustain a verdict that South Water Street, spoken of in the evidence, was a public street, and crossed the right of way of the company in said city, as claimed by the appellant. But if this fact were found in favor of the appellant, it would not be decisive of his right to recover, if he were not himself within the limits of a public street when injured. It would only have a bearing upon the question of the company's negligence or want of care at the time the accident took place; and as we think the question of the company's negligence was a question for the jury, in the view of the case, which we will now proceed to consider, we think it unnecessary to consider further what bearing such finding would have upon the appellant's rights. As to the third proposition of the appellant, viz.,

that the appellant was travelling along a beaten path between the railroad tracks, and not on them, which had been used by the public for passing north and south over Rock river, from Milwaukee Street south to a public street on the north side of the river, and that for more than twenty years the path has been "used by the public, travelling on foot between said points, with the knowledge and acquiescence of said company," we think the evidence tends strongly to sustain it; and in order to sustain the directed verdict, we must consider the case as though such proposition had been found in favor of the appellant by the jury. It is urged that this court ought to say that the evidence does not establish the fact that the company ever in any way acquiesced in this use of their right of way by the public. We think that is clearly a question for the jury under the evidence in this case. We agree with the learned counsel for the railway company that the use of the right of way for the purpose of passage by individuals occasionally, even with the knowledge of the company, should not be construed into an acquiescence in such use by the company, simply because it did not expressly object to such use, or otherwise warn people from making such use of its right of way. But in this case the proof shows more than an occasional use; it tends to show a constant use daily, for twenty years or more, without any protest or objection on the part of the company. We think, from such constant and continued use, a jury might well say that such use was with the acquiescence of the company.

We do not wish to be understood as holding that even the continued use of the right of way of the company, as proved in this case, would establish a public way along the right of way of the company. To establish a public highway alongside of a railroad track, and upon the company's right of way, by a user of even the kind shown in this case, would, we think, be against public policy. Its only effect can be to relieve the persons passing over the same from being treated as trespassers by the company, so long as it continues to acquiesce in such use.

Treating the case as though the appellant, at the time of the injury, was not a trespasser, but a licensee, being where he was with the acquiescence of the company, the real question in the case is whether the company was guilty of any such want of care or negligence as would render it liable to respond in damages for the injuries sustained by the appellant. The ground taken by the learned counsel for the respondent, as we understand it, is that as to a person who is on the company's premises as a mere licensee for his own purposes, the company owes no duty, of what he designates active care or watchfulness, to prevent him from receiving injury; that in such case an injury to such licensee, resulting as a consequence of the omission of watchfulness on the part of the company, or its employees, does not render the company responsible therefor. It

is endeavored to make a distinction between the negligent performance of an act which directly causes the injury and the negligent omission to do an act which results in injury to the same person. Several cases are cited by the learned counsel which are supposed to go upon this distinction. Nicholson v. Railroad Co., 41 N. Y. 525; Sutton v. Railroad Co., 66 N. Y. 243; Johnson v. Railroad Co., 125 Mass. 75; Sweeny v. Railroad Co., 10 Allen, 368; Carlton v. F. I. & S. Co., 99 Mass. 216; Gillis v. Railroad Co., 59 Pa. St. 129; Railroad Co. v. Godfrey, 71 Ill. 500; Railroad Co. v. Hetherington, 83 Ill. 513; Murray v. McLean, 57 Ill. 378–383; and a number of other cases.

There is in these cases considerable discussion upon the subject of the relation between the licensor and licensee, and as to what, if any, duty the licensor owes to the licensee; but in nearly or quite all of the cases the question determined was whether, under the circumstances, the defendant was guilty of any neglect or want of care which the licensee might reasonably demand of him. In the first case cited, in 41 N. Y., the facts were that the railroad company had left four cars on their track near a place where the defendant was in the habit, with others, of crossing the same without setting the brakes. It was proved that it was an up grade from the place where the cars were left to the crossing, and that they were driven upon the crossing by an unusually high wind. The circuit judge charged the jury, as a matter of law, that it was negligence such as would render the defendants liable for the injury to the plaintiff if the brakes were not set. The court of appeals held that the charge was erroneous. It was also held in this case that the plaintiff himself was guilty of negligence in crossing the track with his hat drawn down over his eyes, and without looking to see whether there was any danger at hand. In the case in 66 N. Y., a similar question was raised whether the neglect to set the brake was in law negligence which rendered the defendant liable. The plaintiff's intestate was crossing the track as a mere licensee, and, while in the act, was killed by some cars which were unattended and without brakes set. Justice Andrews says: "If the brakeman knew that there was a slight ascending grade at this place, he could not have anticipated danger to life from the slow movement of the cars a few feet down the grade. . . . It was not, I think, negligence towards the deceased for the brakeman to remit a precaution which, if taken, would have prevented the injury, when the injury could not reasonably have been anticipated, and would not, unless under exceptional circumstances, have happened from the omission."

In the case in 125 Mass. the court held the plaintiff was an intruder and trespasser on the defendant's right of way, and consequently was entitled to such care only as a trespasser can demand. In the case in 10 Allen it was held the plaintiff was entitled to

recover for reasons stated in the case. In the case in 99 Mass. the plaintiff was held entitled to recover, because he had been invited to come upon the defendant's premises. The case in 59 Pa. St. was peculiar in its circumstances, and the company held not liable. The injury was caused by the breaking down of a platform not intended for a part of the depot platform, by the gathering of a large crowd of people from curiosity to see President Johnson, and those with him, while stopping for a short time at the depot. It was held the company were not liable. All the case holds, in fact, is that the company was not guilty of negligence towards a person having no business relations with the company, by reason of the insufficiency of the platform to bear up a crowd of people which it was not intended to accommodate and was not built to accommodate.

In the case in 71 Ill. the court seems to lay down the rule that a person who is on the railroad company's right of way by the mere acquiescence of the company is in no better condition than a wrongdoer or trespasser. We are of the opinion that if such a rule were intended to be announced by the court, it is neither sanctioned by authority nor justice. In 83 Ill. the same doctrine is announced. The main point, however, in that case related to the negligence of the plaintiff himself. The 57 Ill. was a case in which the plaintiff was rightfully on the defendant's premises, and has very little bearing on the question involved in this case.

We think there is a very clear distinction between the care which a railroad company is bound to exercise towards a mere trespasser and one who is on its right of way by the license of the company. In the case of the mere trespasser the company or its servants have no cause to anticipate that he will be on its track or in the way of danger, and therefore a mere neglect to keep a lookout might not be such neglect as would render the company liable for running upon and injuring him. See Railroad Co. *v.* Hummell, 44 Pa. St. 379. Some of the cases, however, hold that such neglect would charge the company for an injury to a mere trespasser. In a case like the one at bar, where the company knew that the right of way is constantly used with its acquiescence by the public as a footway, its servants are charged with notice that it will be so used, and they cannot, without fault, proceed in a manner which must necessarily be dangerous to the persons so using the same. The circumstances of each case determine the degree of care which must be used by persons in charge of such destructive and dangerous instruments as steam engines and railroad trains. The law of the State which prohibits the running of trains within cities at a greater rate of speed than six miles per hour, is based upon the presumption that in such places there will be many people crossing the track or within the vicinity thereof, and that a due regard to life and limb demands that the cars shall not be run at a speed

which will endanger life and limb. Every man's sense of justice and humanity dictates that a railroad company, in running its trains through a place where it must anticipate that men will be in a position to be injured by careless running, must, under such circumstances, exercise a different degree of care than when running in a place where men are not likely to be injured by want of care. It seems to me that a railroad company, after saying to the public, you may use my right of way for travel, cannot, after granting or even permiting such use, run their road without any regard to the fact that the public are so using the same. The knowledge of the company and its servants that the people are using it with its acquiescence, imposes a duty at least of so running and managing their road as not to necessarily endanger the lives of those so using it.

It may be that the company is not compelled to use the highest degree of care to protect those so using their track, and that if it uses its road in the ordinary way, and an injury results, it may not be liable. But certainly it cannot increase the danger to those using its way by acts of carelessness, such as are not permitted in its ordinary use.

The question is whether there was a want of that care on the part of the company and its servants which, under the circumstances, the plaintiff had the right to expect or demand. This idea is well expressed in the following cases:

In Railroad Co. *v.* State, 33 Md. 542–555, the court say: "There are no circumstances under which the defendant could be relieved of the duty of using ordinary care. What constitutes ordinary care may vary with varying circumstances; but as a general rule it is for the jury to determine, and we discover nothing to relieve the case from the operation of the general rule." In this case the deceased had been killed while walking on the defendant's track.

Isabel *v.* Railroad Co., 60 Mo. 475–481. This was also an action to recover damages for an injury to a child unlawfully on its track, and the court say: "Our decisions have been uniform, that, although a person may be improperly or unlawfully on the track of a railroad, still that fact will not discharge the company or its employees from the observance of due care, and they have no right to run over and kill him, if they could have avoided the accident by the exercise of ordinary caution and watchfulness." Again they say: "Diligence and negligence are relative terms, and depend on varying circumstances. An act may be negligent at a particular place which would not be so at another place and under different circumstances." "In the present case the house was built before the road was constructed. The company had run its road in close proximity to the house, and had left the well, where the family got their water, on the other side of the track. They knew that the track ran close to the house, and that the family

were accustomed to cross it to obtain water. This ought to have increased their vigilance."

In Griffiths *v.* Railroad Co., 14 Law T. Rep. 797, Bramwell, baron, says: "If the defendants had had reasons to expect that the people would pass under this crane, or had invited them by word or contract in any way to do so, there would have been evidence of negligence of which the suffering party might complain." In this case it will be seen that the defendants are called upon to use ordinary care towards those persons who may be reasonably expected to pass near the dangerous instrument in use, as well as towards those who are there by invitation.

In Corrigan *v.* Union Sugar Refinery, 98 Mass. 577, the court uses the following language: "The material question is whether the keg fell upon the plaintiff's head by reason of the negligence of the defendant's servant. If it did, then whether, this was a public or private way, and whether the plaintiff was passing over it in the exercise of a public right, or upon an express or implied invitation or inducement of the defendants, or by their mere permission, he was rightfully there and may maintain this action. Even if he was there under a permission which they might at any time revoke, and under circumstances which did not make them responsible for any defect in the existing condition of the way, they were still liable for any negligent act of themselves or their servants which increased the danger of passing, and in fact injured him."

In Gallagher *v.* Humphrey, 6 Law T. (N. S.) 684, Cockburn, C. J., says: "I quite agree that a person who merely gives permission to pass and repass along his close, is not bound to do more than allow the enjoyment of such permissive right under the circumstances in which the way exists; that he is not bound, for instance, if the way passes along the side of a dangerous ditch, or along the edge of a precipice, to fence off the ditch or precipice. The grantee must use the premises as the thing exists. It is a different question, however, where negligence on the part of the person thus having granted the permission is superadded. It cannot be that having granted permission to use the way, subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way. The plaintiff took the permission to use the way, subject to a certain amount of risk and danger, but the case assumes a different aspect when the negligence of the defendant—for the negligence of the servant is his—is added to the risk and danger." Wightman, Justice, says: "It appears to me that such permission as is here alleged may be subject to the qualification that the person giving it shall not be liable for injuries to persons using the way arising from the ordinary state of things, or of the ordinary nature of the business carried on, but that it is distinguishable from the case of injuries wholly aris-

ing from the negligence of that person's servants." The injury in this case was caused by negligence in lowering goods from a warehouse, by reason of which the goods fell upon the plaintiff as he was passing by such warehouse.

The case of Hounsell v. Smyth, 7 C. B. (N. S.) 743, which is cited by the learned counsel in this case, and relied upon, was cited in that by the defendant, and the court held it not applicable to a case where the negligence of the defendant or his servants was the direct cause of the injury. The language of the judges in the case above cited is referred to in the case of Sullivan v. Waters, 14 Irish Com. Law R. 474, with approval.

In the case of Sutton v. Railroad Co., 66 N. Y. 244, much relied upon by the learned counsel for the respondent, the court say: "The defendant having authorized the workmen to cross the track, could not act so as to mislead them, and subject them without notice to perils from which they had a right to suppose they were exempt, without responsibility in a case of injury. But it owed them no duty to guard them from accident, no duty of active vigilance." Certainly this language does not mean that the company, under the circumstances, did not owe the workmen the duty to guard them against the palpable negligence of their servants. The fact that there was no duty of active vigilance does not imply that the company or its servants could be actively negligent.

In Railroad Co. v. Hummell, 44 Pa. St. 379, Justice Strong says: "The defendant had no reason to suppose that either man, woman, or child might be upon the railroad when the accident happened. They had a right to presume that no one would be on it, and to act upon such presumption. . . . Ordinary care they must be held to, but they have a right to presume, and act upon the presumption, that those in the vicinity will not violate the law, will not trespass upon the right of a clear track; that even children of a tender age will not be there, for, though they are personally irresponsible, they cannot be upon the railroad without a culpable violation of duty by their parents or guardians." The company was held not negligent in this case upon the ground above stated. In the case at bar it is clear that the evidence at least tends to prove that the company and its servants had reason to suppose that the plaintiff or other persons would be, with the acquiescence of the company, on its right of way at places where an injury would be likely to occur to them if the boiler on the pile-driver was permitted to explode by the carelessness of those in charge of it at the place where the same was left by them. If the boiler had been carelessly left standing alone in a place where the servants of the company had no cause to suspect that persons would be passing and repassing in its immediate vicinity, it would have been in some respects like the case of Sutton v. Railroad Co. The two cases do not present the same points.

In Vanderbeck *v.* Hendry, 34 N. J. Law, 472, the court say: "It is well settled that the permission for or acquiescence in passage over dangerous lands, whether naturally so or by reason of their use, creates no duty except to refrain from acts which are wilfully injurious or knowingly in the nature of a trap, and except, also, where the circumstances are such that the concealment of hidden dangers would be in the nature of fraud, and then the duty would be to disclose them. The rule is that he who enjoys the permissive or passive license is only relieved from the responsibility of a trespasser, and must assume all the ordinary risks attached to the nature of the place or business carried on." Quotation might be made of a similar character from numberless cases, but to do so would unreasonably extend this opinion, and we will only add the following authorities as holding similar views with those above quoted from: Railroad Co. *v.* Smith, 4 Am. & Eng. Ry. Cas. 535; Hoffman *v.* Railroad Co., 87 N. Y. 25; Rounds *v.* Railroad Co., 64 N. Y. 129; Railroad Co. *v.* Sympkins, 54 Tex. 615; Driscoll *v.* Newark, etc., Co., 37 N. Y. 637; Frick *v.* Railroad Co., 5 Mo. App. 48, 50; Daley *v.* Railroad Co., 26 Conn. 591; Hydraulic Works Co. *v.* Orr, 83 Pa. St. 382.

We do not wish it to be understood that we approve of all that may be said by the learned judges in the cases cited, as some of them, perhaps, hold the defendants to a higher degree of care than this court would under similar circumstances. The general rule to be derived from all the authorities resolves itself into the one question, was the defendant guilty of any culpable want of care, under all the circumstances, and did such want of care result in an injury to the plaintiff? This court has considered questions similar to those presented by the case at bar, in the cases of Delaney *v.* Railroad Co., 33 Wis. 67; Townley *v.* Railroad Co., 53 Wis. 626. In each of these cases we think it is distincly held that the railroad company owes the person who may be on its track or right of way by its acquiescence a duty of care towards such persons which it does not owe to mere trespassers, and is not at liberty to treat them as mere trespassers. In the first case cited, the present chief justice, after showing that the plaintiff was not a mere trespasser upon the defendant's right of way, says: "We therefore think the circuit court was entirely right in holding, upon this proposition, that the plaintiff was not precluded from recovery solely upon the ground that the place where the injury occurred was not a public street, and that it was not necessary, under the circumstances, for the plaintiff to aver and prove gross negligence on the part of those persons who had charge of the locomotive engine and tender, in order to maintain the action."

In the case of Townley *v.* Railroad Co., supra, it was urged to some extent, as it is in the case at bar, that, even as to persons who were upon the defendant's right of way as licensees, the company owed

no duty of care, and could only be held, as in the case of trespassers, to respond for willful injury or gross negligence; and many of the cases cited by the learned counsel for the respondent in this case were cited by counsel in that case. See page 630. Justice Cassoday, who wrote the opinion in the Townley Case, starts out with the question, "Was there an absence of negligence on the part of the defendant?" The whole argument of the opinion is based upon the theory that the defendant was answerable for the injury if its employees were negligent in running the switch-engine which caused the injury. It was taken for granted that although the plaintiff was on the track simply by the license or acquiescence of the defendant, still the defendant owed a duty to such licensee to exercise ordinary care in running its trains and engines; and if an injury was inflicted, by reason of the want of such ordinary care, then the defendant was liable. Again, in discussing the question of the correctness of excluding certain evidence on the trial, Justice Cassoday says: "If such custom existed, and men, women, and children were daily and hourly passing over the same pathway, it certainly had an important bearing, not only upon the question whether Rosa was guilty of contributory negligence at the time, but whether the defendants were exercising ordinary care at the time. If men, women, and children were daily and hourly passing, the servants of the defendants in charge must have known the fact, and hence were called upon to exercise more vigilance and care than though such passage seldom occurred." It seems to me that these cases in this court give no sanction to the theory that a railroad company owes no duty to care for the lives and limbs of those whom it permits to occupy its right of way for the purpose of passage, and can only be held responsible for their willful injury, or for injury which is the result of gross carelessness on the part of the servants of such company. Nor am I able to see that they give any sanction to the theory that although the company, in such case, may be liable where the injury is the direct result of a negligent act of commission, it will not be liable when the injury is the result of the negligent omission of an act which in the exercise of due care the defendant ought to perform.

The case of Cahill v. Layton, 57 Wis. is not in conflict with the cases above cited. All that was decided in that case is that the defendant, in dedicating the way in question for the use of certain persons, dedicated it as it was, and that he was not answerable for an injury received by a person using the same, which was the result of an obstruction in the way as dedicated. It was decided upon the same grounds stated in the case of Gallagher v. Humphrey, supra. In that case there was no question of any negligence on the part of the defendant which rendered the way more dangerous for use than when it was first dedicated, nor of any act of negligence of the defendant occurring at the time which

caused the injury. We do not perceive that the opinion in that case has any particular bearing upon the question involved in the case at bar.

The evidence in the case at bar tends to prove that the persons in charge of the boiler and pile-driver were culpably negligent in leaving it unattended for more than half an hour in the condition the evidence tends to show it was. Hayward, the defendant's witness, and who was competent to give an opinion on the subject, testified that if the boiler was left with such a fire in the fire-box, as the plaintiff claimed the evidence showed there was, an improper amount of steam would be generated in the boiler. He further said: "It is not safe and propor to leave a boiler and engine unattended with a large fire in the fire-box. It is very unsafe and improper to do it with a large fire."

It was certainly for the jury, and not the court, to say, upon the whole evidence, whether this act of negligence was the cause of the explosion. And it was also for the jury to say whether it was a want of ordinary care on the part of those in charge to leave so dangerous an engine unattended in the immediate vicinity of a place where they knew people would be passing and repassing. This court cannot say, as a matter of law, that the explosion was the result of causes which were unforeseen, and that such explosion would have occurred at the same time and in the same way, and produce the same injury, if the men in charge had remained there during the half hour they absented themselves. These are questions for the jury. We do not say that the plaintiff could recover in this action if the jury should find as a fact that the explosion of the boiler was the result of a defect in the iron of which it was originally made, or because of defects arising out of its use, and which were unknown to the persons in charge at the time of the accident, and were not discoverable by the ordinary inspection given to it. An explosion occurring from snch causes might be said to be one of the risks incident to the business, and that all such risks the licensee assumes when he avails himself of the privilege granted by the company; but if they find that the explosion occurred by reason of the negligence of those in charge in permitting the steam to be raised to an unsafe pressure in the boiler, and that the explosion occurred from that cause, then we think the clear weight of authority is in favor of the plaintiff's right to recover. Upon the first theory, the want of attendance at the time would not be the cause of the explosion; and, on the second theory, it would be, or might well be found to be.

It is suggested that because the statute makes it an offense to walk along the track of a railroad, the defendant should not be held liable for an injury which is caused by its negligence. We do not think that this statute can have any effect in a case like the present, where the proof shows that the law was constantly violated by the

people with the knowledge and acquiescence of the defendant. It might have some bearing upon the question of negligence as to mere trespassers, as the company would have the right to say, perhaps, that it was not bound to the exercise of care towards those whom the law has forbidden to be upon their right of way. See Townley v. Railroad Co., 53 Wis. 634. The other questions discussed by the learned counsel for the appellant do not seem to me to have any direct bearing upon the plaintiff's rights, except as far as they tend to prove that he was not a mere trespasser on the defendant's way at the time he was injured. We think the case should have been submitted to the jury upon the question of the negligence of the defendant's employees in charge of the boiler and pile-driver at the time the explosion took place which caused the injury.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

Persons on Track by License of Company—Duty of Company.—Where persons have become accustomed to use the track of a railroad company as a foot path and have done so with the express permission of the company, greater caution is required in the running of trains than where no such permission is given. Harty v. Central, etc., R. Co., 42 N. Y. 568; Kay v. Pennsylvania R. R. Co., 65 Pa. St. 269; Pennsylvania R. R. Co. v. Lewis, 79 Pa. St. 33; Illinois, etc., R. R. Co. v. Hammer, 72 Ill. 347; Murphy v. Chicago, etc., R. Co., 45 Iowa 661; Brown v. Hannibal, etc., R. Co., 50 Mo. 461; Daley v. Norwich, etc., R. R. Co., 26 Conn. 591; Kansas, etc., R. Co. v. Pointer, 9 Kans. 620; s. c., 14 Kans. 38; Sutton v. New York, etc., R. Co., 66 N. Y. 243; Nicholson v. Erie R. Co., 41 N. Y. 525; Donaldson v. Milwaukee, etc., R. Co., 21 Minn. 293; Chicago, etc., R. R. Co. v. Ryan, 70 Ill. 211.

Mere passive Acquiescence does not Amount to License.—But the mere fact that persons living in a certain locality have become accustomed to walk upon the track and that no measures have been taken to prevent them does not alter the measure of duty on the part of the railroad company. Finlayson v. Chicago, etc., R. Co., 1 Dillon, 579; Bancroft v. Boston, etc., R. Co., 97 Mass. 276; Jeffersonville, etc., R. R. Co. v. Goldsmith, 47 Ind. 43; Galena, etc., R. Co. v. Jacobs, 20 Ill. 478; Illinois, etc., R. Co. v. Godfrey, 71 Ill. 500; Illinois, etc., R. Co. v. Hetherington, 83 Ill. 510; Indiana, etc., R. Co. v. Hudelson, 13 Ind. 325; Gaynor v. Old Colony R. Co., 100 Mass. 508; Dublin, etc., R. Co. v. Slattery, L. R. 3 App. Cas. 1155; McLaren v. Indianapolis, etc., R. Co., 8 Am. & Eng. R. R. Cas. 217; Yarnall v. St. L., K. C. & N. R. Co., 10 Am. & Eng. R. R. Cas. 726; Hogan v. Chicago, etc., R. Co., infra.

Duty of Person on Track whether Licensee or not.—A person upon the track of a railroad whether by license and permission of the company or not is bound to keep his eyes and ears on the alert for approaching trains. If he neglects this duty he is guilty of contributory negligence. Wilcox v. Rome, etc., R. Co., 39 N. Y. 358; Sutton v. New York, etc., R. Co., 66 N. Y. 243; Bancroft v. Boston, etc., R. Co., 97 Mass. 275; Illinois, etc., R. Co. v. Hetherington, 83 Ill. 510; Railroad Co. v. Houston, 95 U. S. 697; Mulherrin v. Delaware, etc., R. Co., 81 Pa. St. 366; Carroll v. Minn., etc., R. Co., 13 Minn. 30; Carlin v. Chicago, etc., R. Co., 37 Iowa, 316: Chicago, etc., R. Co. v. Sweeney, 52 Ill. 325; Illinois, etc., R. Co. v. Modglin, 85 Ill. 481.

Workmen upon Track.—Where workmen are placed upon the track by a railroad company to do work, the company must be as to them actively vigilant. Baltimore, etc., R. Co. v. State, 33 Md. 542; McWilliams v. Detroit,

etc., Mills Co., 31 Mich. 274; Goodfellow *v.* Boston, etc., R. R. Co., 106 Mass. 461; Haley *v.* New York, etc., R. Co., 7 Hun. 84; Stinson *v.* New York, etc., R. Co., 32 N. Y. 333; Ominger *v.* New York, etc., R. Co., 4 Hun. 159; Penna. Coal Co. *v.* Conlan, 6 Am. & Eng. R. R. Cas. 243.

Such persons have a right to become engrossed in their employment and to expect that care and pains will be taken as to them. Schultz *v.* Chicago, etc., R. Co., 44 Wisc. 638; Goodfellow *v.* Boston, etc., R. Co., 106 Mass. 461. But see Besel *v.* N. Y. Central & H. R. R. Co., 70 N. Y. 171; Baltez *v.* Ohio, etc., R. Co., 85 Ill. 500.

Parties Loading and Unloading Freight.—Where parties are engaged in loading and unloading freight and are lawfully on the track for that purpose they may rely on diligence on the part of the company in taking care of them. Allegheny Valley R. R. Co. *v.* Findley, 6 Cent. L. J. 236; Newson *v.* New York, etc., R. Co., 29 N. Y. 383. But see Chicago, etc., R. Co. *v.* Clarke, 70 Ill. 276. And it is evident that under some circumstances such a person may be negligent in placing himself on the track. Chicago, etc., R. Co. *v.* Clark, 11 Ch. L. N. 111; Fletcher *v.* Boston, etc., R. R. Co., 1 Allen 99; Illinois, etc., R. R. Co. *v.* Weldon, 52 Ill. 290: New Orleans, etc., R. Co. *v.* Bailey, 40 Miss. 395. But see Newson *v.* New York, etc., R. Co., 29 N. Y. 383.

Care Expected of Person in Peril.—A person who is lawfully on the track cannot if exposed to sudden peril be expected always to act in the wisest manner. If he does not thus act but on the contrary increases his danger and is injured in consequence, his right to recover damages is unimpaired. Indianapolis, etc., R. Co. *v.* Carr, 35 Ind. 510; Chicago, etc., R. Co. *v.* Dignan, 56 Ill. 487; Toledo, etc., R. R. Co. *v.* O'Connor, 77 Ill. 391; Schultz *v.* Chicago, etc., R. R. Co., 44 Wisc. 638.

HOGAN

v.

CHICAGO, M. AND ST. P. RY. CO.

(*Advance Case, Wisconsin. December* 12, 1883.)

The question of negligence is or may be a mixed question of law and fact. It may embrace facts upon which the charge of negligence is predicated, and the conclusion of law to be deduced therefrom, as to whether such facts do or do not constitute negligence. When the facts found lead irresistibly to the conclusion of negligence or the absence of it, the inference of negligence or the absence of it is purely a conclusion of law; but where the facts found may leave the inference of negligence or no negligence in doubt, the question of negligence is for the jury, because other facts not found are necessarily to be considered and determined before the inference can properly be drawn.

Where the special findings of fact by a jury and the averments of the complaint conclusively show that the defendant was free from any negligence which caused an alleged injury, the question of negligence is one of law, and findings in the verdict that defendant was guilty of such negligence amount only to a conclusion of law, and are overcome by the specific findings of fact which demonstrate that the conclusion is erroneous.

Where a person who is a mere licensee upon the track of a railway com-

pany is injured by the backing of a train of cars by an engine coupled thereto, if his presence there is unknown to and unexpected by the servants of the railway company operating the train, and would not be reasonably anticipated by them; if the usual signals of ringing the bell and sounding the whistle of the locomotive are given,—the former being continued to the time the couplings were made; and if the train is being operated and the business conducted, when the accident happens, in the usual manner,—the requirements of ordinary care and diligence are fully complied with, and the railway company is not required to give any other notice, signal, or warning of the movements of the train or coupling of the cars.

In a case where the special findings of the jury show the existence of such circumstances, the question of negligence is a question of law, and a finding of negligence as well as a general verdict for the plaintiff for damages for an injury so caused must yield to the special findings of fact, and can have no weight in determining the judgment to be entered by the court.

APPEAL from County Court, Milwaukee County.

The plaintiff, John Hogan, an infant under seven years of age, brought this action, by his guardian ad litem, to recover damages for personal injuries caused by the alleged negligence of the servants of defendant company. After alleging the appointment of a guardian ad litem for plaintiff, and the incorporation of the defendant, the complaint proceeds as follows:

"That at the time hereinafter mentioned there was a railroad side track extending from the main tracks of said defendant, in the Fourth ward of the city of Milwaukee, over private property, in an easterly direction to the south side of a water-course running east and west, known as Kneeland canal; that said side track was used by the defendant, but that the ground over which it lay was not in the exclusive possession of the defendant nor devoted to its exclusive use, but the same was habitually and largely used for travel by teams and pedestrians; and, especially at a point nearest to said water-course, it was constantly and habitually used for passage and travel by teams and persons on foot, and with a view and for the purpose of facilitating such passage and travel the space next to and between the rails of said track was planked and so arranged as to make the crossing of the same convenient and easy, and to indicate by its appearance that it was a proper place for crossing and travel, and that such place was near a public street, and open and free of access to everybody, all of which said defendant well knew.

"That on the twenty-second day of September, 1881, a train of freight cars of said defendant stood on said side track, immediately west of said place of crossing and passage; that there was no locomotive engine or other motive power attached thereto, and the same stood there a long time, to wit, several hours without moving, and that said defendant had been in the habit of keeping detached cars standing in said place on said side track for long periods of time without moving the same; that on said twenty-second day of September, 1881, said plaintiff, being then less than six years of age, was on said side track immediately to the east of said train

of cars, standing thereon, as aforesaid, and on the part of said track which was a common and open passage-way and crossing, as aforesaid; that he was there lawfully, and without fault or negligence on his part or the part of his parents; and that said defendant then and there suddenly, and without any notice or signal thereof being given, with gross carelessness and negligence, and recklessly, by means of a locomotive applied at the western end of said train, at a great distance from the east end thereof, and which could not be seen from the place where said plaintiff was, started and propelled said train eastwardly on said track, by means whereof said plaintiff, without any fault or negligence on his part, was knocked down by the most easterly of said cars, thrown upon the track where the wheels of said car passed over his left arm and crushed the same so that it had to be amputated.

"That it was the duty of said defendant, in the exercise of ordinary care, before starting said cars and pushing the same eastwardly over the said common and habitual passage-way and crossing, to give due and proper notice of its intention so to do, so as to warn away persons who might be there, but that said defendant wholly failed and neglected so to do."

The answer is (1) a general denial; (2) contributory negligence of the plaintiff; (3) like negligence of his parents. A trial of the issues by a jury resulted in a special verdict, in the form of questions and answers, as follows: "(1) Does ordinary care and prudence require that a reasonable notice, signal, or warning should be given before moving a train backwards upon the place where the plaintiff boy stood, in the manner in which the train by which the boy was injured in this case was moved back? *Answer.* Yes. (2) Was such a notice given in this case? *A.* No. (3) If not, was the omission to give the same negligence on the part of the defendant or its employees? *A.* Yes. (4) Was such negligence the proximate cause of the plaintiff's injury? *A.* Yes. (5) Was there any negligence on the part of the plaintiff contributing to the injury, considering the age and degree of intelligence of the plaintiff, at the time of the injury? *A.* No. (6) Was the engine bell rung while the engine was backing in on the side track, and while the couplings were being made? *A.* Yes. (7) Did the defendant make the coupling, at the time of the accident, with care? *A.* No. (8) Was the work upon this side track, on the day in question, done in the same manner in which it had been done for a long time prior to the accident? *A.* Yes. (9) Was the engine whistle sounded? If yes, where was the engine when the whistle blew? *A.* Engine whistle sounded on the main track, going west to the switch. (10) How far easterly did the rear car move when the second coupling was made? *A.* From 3 to 10 feet. (11) Was Caroline Hogan guilty of negligence in her care of John Hogan on the day of the accident and prior to the accident? *A.*

No. (12) Was Mrs. Hogan guilty of negligence in her care of John Hogan? *A.* No. (13) Did the accident occur at a place where the men in charge of the train would naturally expect a little child to be upon the track? *A.* No. (14) Ought the trainmen, in the exercise of ordinary prudence, to have anticipated, as the probable result of their act in coupling the cars, that a child would be injured? *A.* No. (15) Do you find for the plaintiff or for the defendant? And, if you find for the plaintiff, at what sum do you assess the damages? *A.* We find for the plaintiff, and assess the damages at twenty-two hundred dollars." Each party moved for judgment on the verdict. The motion of the plaintiff was denied, and that on behalf of the defendant was granted, and judgment for the defendant was entered accordingly. The plaintiff appeals from the order denying his motion, and from the judgment against him, pursuant to Laws 1883, c. 49.

Jenkins, Winkler & Smith for appellant, John Hogan, by guardian ad litem.

John W. Cary and D. S. Wegg for respondent, the Chicago, M. & St. P. Ry. Co.

LYON, J.—The record contains no bill of exceptions. The motion on behalf of the defendant company for judgment was based upon the minutes of the judge as well as upon the verdict. It is claimed for defendant that, in the absence of a bill of exceptions preserving the testimony, it must be presumed that the undisputed testimony, independently of the question submitted to the jury, establishes the right of the defendant to a judgment. This proposition is based upon the familiar rule that error is never to be presumed, but to be available must always be made to appear affirmatively. The argument of the learned counsel for the plaintiff against the proposition is, in substance, that resort can only be had to the minutes of the court—that is, to what transpired on the trial—in motions for new trials made at the trial terms (Rev. St. p. 764, § 2878), and hence that a judgment cannot properly be rendered upon what appears only in the minutes of the court, and especially when the judgment contravenes the verdict of the jury. The question is an interesting one, and may become important in future cases, but the view we have taken of the verdict renders it unnecessary to determine it in the present case. We shall therefore consider the case upon the pleadings and verdict alone.

The answers to the fifth, eleventh, and twelfth questions acquit the plaintiff and his parents of any negligence which contributed to the injury complained of. It will be assumed, for the purposes of the case, that those questions were correctly answered, and that neither the plaintiff nor either of his parents are chargeable with negligence in that behalf. The answers to the first four and the

seventh questions are to the effect that the defendant company is chargeable with negligence which caused the injury to the plaintiff. These, standing alone, would entitle the plaintiff to judgment, he and his parents being free from negligence in the premises. We are to determine how these findings of the defendant's negligence are affected by the other findings of the jury, to wit, by the sixth, eighth, ninth, tenth, thirteenth, and fourteenth findings, and by the averments of the complaint, to the effect that the place where the plaintiff was injured was the private grounds of the company, but that the plaintiff was lawfully on those grounds by the implied license and permission of the company.

The question of negligence is, or may be, a mixed question of law and fact. It may embrace the facts upon which the charge of negligence is predicated, and the conclusion of law to be deduced therefrom, as to whether such facts do or do not constitute negligence. In some cases the facts found lead irresistibly to the conclusion of negligence or the absence of it. In such cases the inference or negligence or the want of it is purely a conclusion of law. Hicks *v.* Town of Marshall, 24 Wis. 139, and Delaney *v.* Railway Co., 33 Wis. 67, belong to this class. In other cases the facts found may leave the inference of negligence or no negligence in doubt. In such cases the question of negligence is for the jury. But it is so because other facts, not found, are necessarily to be considered and determined before the inference can properly be drawn. Of this class are the cases of Sutton *v.* Wauwatosa, 29 Wis. 21, and Kenworthy *v.* Ironton, 41 Wis. 647. There are numerous other cases determined by this court which belong to one or the other of these classes, and which illustrate the distinction between them.

If the findings of fact last above specified, and the averments of the complaint, conclusively show that the defendant was free from any negligence which caused the injury complained of, this case belongs to the class first above mentioned. In that event the findings in the verdict that the defendant was guilty of such negligence amount only to a conclusion of law, and are overcome by the specific findings of fact which demonstrate that the conclusion is erroneous. This is on the same principle that a general verdict must yield to special findings inconsistent with it. Rev. St. p. 760, § 2860. But if the case is within the other class above mentioned, the findings that the defendant was negligent are something more than mere conclusions of law. In that event they embrace and include the element of fact not specially found, as well as of law, and cannot properly be disturbed. So the case turns upon the question, to which of the above classes does it belong? If to the first, the judgment is right and must be affirmed; if to the other class, it is erroneous and must be reversed.

The findings that the defendant was negligent in the premises

are predicated entirely upon its supposed duty to give some notice, signal, or warning, other than was given, that it was about to run its locomotive upon the side track and attach it to the train of cars standing thereon. The verdict does not inform us what further notice, signal, or warning ought to have been given. This is, indisputably, the negligence imputed in the seventh finding, as well as in the first four findings, because no other negligence in making the coupling is charged in the complaint. We may assume that any fact stated in the complaint, but not specially found by the jury, was proved on the trial, but it cannot be presumed that facts not so stated or found were proved. Farrell v. Drees, 41 Wis. 186. Should it be claimed the complaint charges that the locomotive was propelled too rapidly and violently against the train of cars standing upon the side track, while we do not think it so charges, we are of the opinion that the charge, if made, is negatived by the tenth finding, that the rear car, which ran over the plaintiff, was only moved from three to ten feet when the coupling was made.

The pleadings and verdict establish these facts: (1) The plaintiff was on the private grounds of the company when injured, and, at most, was a mere licensee on such grounds. (2) He is a child of tender years; the train-men had no reason to think such a child would be on the track in the rear of the train, and reasonable care and prudence did not require them to anticipate, as a result of coupling the cars, that such a child would be injured. (3) The work on the side track at the time of the injury (which included, of course, the running of the locomotive upon it, the signals, and the mode of coupling) was done in the same manner in which it had been done for a long time before the accident. (4) The engine whistle was sounded as the engine was moving west on the main track to go on the switch. (5) The engine bell was rung while the engine was backing in on the side track, and while the couplings were being made.

As before observed, the only negligence imputed to the defendant is that it failed to give proper notice, signal, or warning while running its engine on the side track and making the couplings to the train standing thereon. The precise question to be determined is, therefore, under the circumstances of the case, were or were not the signals of blowing the whistle and ringing the bell, as the same were done, all the signals, notice, or warnings which the defendant was required to give that its locomotive was about to be run upon the side track and the couplings were about to be made? The jury have answered the question in the negative. Is the answer correct or erroneous? The plaintiff was upon the private grounds and track of the defendant for his own purposes. He was lawfully there, however, by virtue of an implied license given by the defendant to the whole public, including the

plaintiff. Being lawfully there, the defendant owed him the duty of exercising ordinary care to avoid injuring him while there. But the requirements of ordinary care are, or in some cases may be, fulfilled, in a case like this by the employment of far less precautions to avoid accident than would be required were the locus in quo a public highway, usually thronged with people. Such is the doctrine of Davis *v.* C. & N. W. Ry. Co. It is said in the opinion by Mr. Justice Taylor in that case: "It may be that the company is not compelled to use the highest degree of care to protect those so using its track, and that if it uses its road in the ordinary way, and an injury results, it may not be liable."

The question of the duty of a railway company to a mere licensee upon its track, for his own pleasure and convenience, was elaborately and most ably discussed in that case; and numerous cases bearing upon it, both English and American, were cited by the learned counsel. Many of them are commented upon by Mr. Justice Taylor. The rule appears to be established by those cases (and there seems to be little or no conflict of authority on the subject) that in a case like this, where a person who is a mere licensee upon the track of the railway is injured as was this plaintiff, if his presence there is unknown to and unexpected by the servants of the railway company operating the train, and would not reasonably be anticipated by them; if the usual signals of ringing the bell and sounding the whistle of the locomotive were given—the former being continued to the time the couplings were made; and if the train is being operated and the business conducted, when the accident happens, in the usual manner—the requirements of ordinary care and diligence are fully complied with, and the railway company is not required to give any other notice, signal, or warning of the movement of the train or coupling of the cars. The cases from which this rule is deduced are cited in the brief of counsel for the defendant in Davis *v.* Railway Co., supra, and doubtless such citations will be preserved in the report of the case. It is not deemed important or necessary to enlarge upon them here, after the very full discussion of the subject by Mr. Justice Taylor in that case.

It follows from the foregoing propositions that the special findings of fact demonstrate that the defendant is not chargeable with negligence in the premises. This eliminates from the finding that it was negligent, every element of fact, and leaves it a mere naked conclusion of law, entirely unsupported by the facts. Being so, we have already seen that the finding of negligence, as well as the general verdict for the plaintiff, must yield to the special findings of fact, and can have no weight in determining the judgment. Because the special findings of fact establish conclusively that the plaintiff was not injured by means of any default or negligence of

the defendant company, the county court properly gave judgment for the defendant upon the verdict.

Judgment affirmed.

Mere Licensees on Railroad Track.—Where persons upon a railroad track are mere licensees without any express permission from the company to be there the company does not owe them any measure of duty. Gaynor v. Old Colony, etc., R. Co., 100 Mass. 208; Jeffersonville, etc., R. Co. v. Goldsmith, 47 Ind. 43; Bancroft v. Boston, etc., R. Co., 97 Mass. 276; Galena, etc., R. Co. v. Jacobs, 20 Ill. 478; Illinois, etc., R. Co. v. Godfrey, 71 Ill. 500; Illinois, etc., R. Co. v. Hetherington, 83 Ill. 510; Finlayson v. Chicago, etc., R. Co., 1 Dill. 579; Philadelphia & Reading R. Co. v. Hummell, 44 Pa. St. 375; Davis v. Chicago & N. W. R. Co., supra; McLaren v. Indianapolis, etc., R. Co., 8 Am. & Eng. R. R. Cas. 217; Yarnall v. St. L., K. C. & N. C. R. Co., 10 Am. & Eng. R. R. Cas. 726. But see Dublin, etc., R. Co. v. Slattery, L. R. 3 App. Cas. 1155; Illinois, etc., R. Co., v. Hammer, 72 Ill. 347; Kay v. Pennsylvania R. Co., 65 Pa. St. 269.

Backing Cars.—As to the usual obligations on the part of a railroad company where cars are backed at a crossing, see Bradley v. Boston, etc., R. Co., 2 Cush. 539; Shaw v. Boston, etc., R. Co., 8 Gray, 45; Bailey v. New Haven, etc., R. Co., 107 Mass. 496; Hathaway v. Toledo, etc., R. Co., 46 Ind. 25; Kennedy v. North Missouri R. Co., 36 Mo. 351; Grippen v. New York, etc., R. Co., 40 N. Y. 34; Leavenworth, etc., R. Co. v. Rice, 10 Kans. 426; Lake Erie & W. R. Co. v. Zoffinger, infra; Bohan v. Milwaukee, L. S. & M. S. R. Co., infra.

EAST TENN., VA. AND GA. R. R. CO.

v.

FEATHERS.

(10 *Lea's Reports* (*Tenn.*), 103.)

The statutory precautions of sub-section 3 of sec. 1166 of the Code as to signal boards and signals have no application where a person is injured while travelling along a public road near to and parallel with the railroad.

APPEAL in error from the Circuit Court of Washington County.

John Allison and W. M. Baxter for Railroad.

S. J. Kirkpatrick for Feathers.

FREEMAN, J.—This action is brought by the husband, to recover damages for injuries received by the wife by reason of her horse being frightened by a train on defendant's road.

The facts are, that plaintiff and his wife were riding horseback from church. The road they chose to travel, after crossing the railroad, ran along near and parallel to the railroad for probably

a mile or more. Plaintiff and wife were riding along this road going east, having passed the crossing from a quarter to half a mile west of where the public road crossed the railroad, when a train approached from the west going east, the noise of which frightened the wife's horse, which threw her, and injured her severely.

We need decide only one question presented in this case. His Honor, the circuit judge, held the failure to use the precautions required by sec. 1166–sub-sec. 3, would have entitled plaintiff to re cover. This is the general theory of his charge, and if erroneous is conclusive of the result in this case.

Sub-section 2, of the above section of the Code, provides for a sign to be placed by the overseer of any public road at any crossing, marked, "Look out for the cars when you hear the whistle or bell." No engine driver is required to blow the whistle or ring the bell at any crossing unless it is so designated.

Sub-section 3 is: On approaching any crossing, so distinguished, the whistle or bell of the locomotive shall be sounded at the distance of one fourth of a mile from the crossing, and at short intervals till the train has passed the crossing.

It seems clear this language imposes a duty on the company in order to give warning to persons about to cross the road, or who may be in the act of crossing possibly, or had just passed over the road, but it does not apply to parties who are not about to cross the road, but are simply travelling alongside, as in this case, showing an evident purpose not to cross at all. If the parties had been injured in attempting to cross the road, either when near the track, before passing over, or immediately after crossing, but still as the result of failure to blow the whistle or ring the bell to warn them of the approach to the crossing by the train, a right of action would have accrued. But where the parties are not endangered by crossing the road, but only by reason of travelling parallel to it, the statute precautions can have no application.

What might be the rights and duties of the parties at common law, we need not determine on the facts of this case.

We only decide that the statutory regulations do not apply in favor of parties not injured in crossing or attempting to cross a railroad, but simply by reason of the fact that they are casually riding along near and parallel to the railroad on a public road, with no purpose to cross it.

Reverse the judgment and remand for another trial.

See Rosenberger v. Grand Trunk Ry. Co., and note.

ROSENBERGER

v.

GRAND TRUNK RY. CO.

(8 *Ontario Appeal Reports*, 482.)

The respondents, the plaintiffs in the court below, were lawfully driving in their carriage along the highway, and when within about 116 feet of the crossing of appellants' railway a train passed, which frightened the horse causing it to turn and upset the vehicle, by which the plaintiffs sustained serious injury. It was shown that the driver of the locomotive had omitted to give the usual statutory signal, by whistling or ringing a bell, when at a distance of eighty rods from such crossing. In an action brought against the railway company a verdict was found in favor of the plaintiffs, which the Common Pleas Division refused to set aside. On appeal this judgment was affirmed, and the appeal dismissed with costs.

The general words used in the statute must, having regard to the general provisions thereof, be intended only for those actually crossing the railway and injured when so crossing, or who in the exercise of reasonable diligence and care, but in endeavoring to escape peril, have sustained injury. The sounding of the whistle or the ringing of the bell was intended as a warning only to those about to cross the track of railway.

THIS was an appeal by the defendants from the judgment of the Common Pleas Division (reported 32 C. P. 349), where, and in the judgments, the facts of the case are fully and clearly set forth.

The appeal came on to be argued before this court on the 22d and 23d days of January, 1883.

Bethune, Q. C., for the appellants. Although two trials have already taken place in the cause, there is not any finding by the jury saying that the injury sustained by the respondents occurred in consequence or by reason of the alleged non-observance of the statutory duty cast upon the appellants, of sounding the whistle or ringing the bell when approaching the crossing near which the accident happened; and the court below should not have supplied such finding upon the evidence which has been given.

It was contended at the trial, and the appellants still insist, that such alleged omission to observe this statutory duty was not the proximate cause of the injury; and it is shown that the respondents were guilty of contributory negligence, and therefore were not entitled to recover.

The object of the statute in requiring a signal to be given by either whistle or bell was to prevent injuries by collision; but here there was no collision; the horse was frightened by the appearance

of the train, and therefore the company were not answerable in damages; in other words, the appellants did not owe the respondents any duty to give the signals mentioned in the statute.

Bowlby for the respondents. The finding of the jury, in answer to the sixth question, submitted to them by Mr. Justice Patterson, who tried the case, taken in connection with the evidence, which must always be done with the findings of juries given in answer to questions, sufficiently shows that the respondents sustained the injury complained of by reason of the neglect of the appellants to give the requisite statutory signal by whistle or bell. This case has already been twice tried by a jury; and another new trial will not be granted for the mere purpose of asking the jury one additional question, the answer to which the court can foresee to a certainty upon the evidence now before it, and upon which the court itself has full power to find and give judgment by the O. J. Act, Rule 321, and upon which the evidence is conclusive in favor of the respondents.

The respondents did not admit at the trial that the non-observance of the statutory duty as to the signal was not the proximate cause of the injury to the respondents. On the contrary, the respondents then contended, and still contend, that (in the words of the statute) their "damages were sustained by reason of such neglect;" and that the negligence of the defendants was such a proximate cause of the injury that they are liable therefor, although the two circumstances—the rush of the train and the fright of the horse—intervened between the neglect and the injury.

So far as contributory negligence is charged against the plaintiffs, all that need be said is that there was no evidence of any such, and the jury found there was none. Here the evidence clearly establishes that the train was unlawfully upon the highway, without having first given the signals required by the statute, while passing over the last eighty rods of their approach to the crossing of the highway, and for this neglect the company is subject to a penalty of $8 by the statute, even if there had been no accident. This statutory penalty of $8 imposed on the appellants made their act in bringing their train upon the highway at the time in question unlawful and unauthorized, and so brings this case within that large class of cases where it is held that if an act be done upon the highway which is not a part of the lawful user of it, and which endangers its use to others, and damage results from such use, an action will lie.

Toms *v.* Corporation of Whitby, 35 U. C. R. 195; Shields *v.* Grand Trunk R. Co., 7 C. P. 111; Tyson *v.* Grand Trunk R. Co., 20 U. C. R. 256; Miller *v.* Grand Trunk R. Co., 25 C. P. 389; Wakefield *v.* Connecticut R. R. Co., 37 Verm. 389; Hamilton *v.* Johnson, 5 Q. B. D. 263; Norton *v.* Eastern R. R. Co., 113 Mass. 366; Pollock *v.* Eastern R. R. Co., 124 Mass. 158; Prescott *v.*

Eastern R. R. Co., 113 Mass. 370; Harris v. Mobbs, 3 Ex. D. 268; Vars v. Grand Trunk R. R. Co., 23 C. P. 143, were referred to.

SPRAGGE, C. J. O.—In this case there have been two trials, the verdict in each being in favor of the plaintiffs.

One ground for appeal now is, that the finding of the jury in reference to the giving of the signals is against the weight of evidence.

I have read the whole of the evidence. In the case of The Dublin & Wicklow R. R. Co. v. Slattery, L. R. 3 App. 1155, the law Lords, I think, without exception, expressed their strong disapprobation of the verdict, intimating their opinion that the jury were not unwilling to gratify their feelings of compassion for the plaintiffs at the expense of the defendants. Lord Blackburn said, p. 1208: "The weight of the evidence was for the jury, not for the judge. The defendants' evidence was extremely strong that there was a whistle. The jury chose to disbelieve the defendants' witnesses; or, I think more probably, though believing them, chose to find for the widow and orphans against the railway company. I think such a verdict was most unsatisfactory."

The verdict in the case before us is certainly not open to any such observations as were made in the case in the Lords. There was in this case really such a conflict of evidence that we cannot say that the verdict is attributable to the sympathy of the jury for the plaintiffs. In my opinion this ground of appeal is untenable. The dissentient judge in the court below, the learned Chief Justice of the Common Pleas, does not indeed base his judgment at all upon that ground; for he says, "There is certainly the neglect of the company to the satisfaction of the jury," adding, not without reason, I fear, in reference to a certain class of cases, "whatever that may be worth in such an action."

The next passage in the Chief Justice's judgment is: "And no neglect or cause of complaint has been proved against the plaintiffs, who have been seriously injured by the accident;" and in this, after a careful perusal of the evidence, I entirely agree. It meets another ground of appeal, "that the plaintiffs were guilty of contributory negligence."

Upon the main question, however, in which the learned Chief Justice differed from his brother judges in the court below, I am unable to agree with him. His opinion is shortly, that the statute upon which he assumes (probably correctly) that this action is brought, applies only to cases of injury from actual collision, not to accidents resulting from other causes, though produced by the negligence of the servants of the railway company in the railway service. He says, "The statute was passed for a wholly different purpose, and their (the plaintiffs) claim cannot be distinguished from the many other analogous cases in which there is as much ne-

cessity for protection, and in my opinion more necessity in some of them, yet it has never been thought necessary or prudent to extend the law to meet such cases."

I confess I feel difficulty in appreciating the force of the learned Chief Justice's reasoning. He puts a number of cases to which he assumes that the statute does not apply, and draws the conclusion that if it does not apply to them, it cannot apply to the plaintiffs' case, because their case is not a case of actual collision. But the statute contains not a word about actual collision. Its language is wide enough to comprehend, if not all the cases put by the Chief Justice (and it is unnecessary to say what of them it does comprehend), it is certainly wide enough to comprehend the plaintiffs' case. They were driving along the highway, from one place to another place, to reach which it was necessary to cross the railway track where it intersects the highway, and they were approaching the point of intersection when the accident occurred. It must be taken upon this branch of the case, to have been occasioned by the negligent omission of the company's servants to give the warning required by the statute. Now what does the statute provide in the way of penalty and compensation in that event? Besides a pecuniary penalty, it provides that the company shall also be liable for all damages sustained by any person by reason of such neglect. I really cannot see any warrant for saying that these words shall have only half their ordinary meaning; that all damages sustained by any peason shall be read as meaning, "such damages as may be sustained by such persons as may suffer injury by reason of actual collision."

There is nothing in the context to show that the language used is to be read in any other than in its ordinary grammatical sense; and that being so, we violate a plain rule of interpretation if we read it otherwise. But it is said that certain consequences would follow if we so read it. What are those consequences, even assuming that they would follow? Only that the statute omits to provide compensation for other cases of injury occasioned by the like neglect? Take it to be so, it can be no reason for holding it not to provide compensation for a class of cases within its provisions. Then there are no words of exclusion of any class. The law may say as to some cases that the injury is too remote, or the damage too remote; but the statute does not say so. In few words, the statute neither names any class nor excludes any class. But again, supposing some class impliedly excluded, some class to which the remedy given by the Act could not apply, a class too in which there is, as put by the learned Chief Justice, as much necessity for protection as in the class to which these plaintiffs belong—how would it be a reason for denying to the plaintiffs the remedy given by the statute? We might call it a casus omissus, or might surmise that for some reason, sufficient or insufficient, it was design-

edly omitted. The question still seems how is it a reason for denying to the plaintiffs their remedy. No doubt the statute must apply to a case of actual collision or it could not apply to any case, but its undoubted application to such a case can be no reason for denying its application to other cases coming fairly within its provisions.

I do no feel pressed by the question that has been propounded. To whom does the railway company owe the duty of giving warning by whistle or bell? The question does not aid the argument one way or the other. The answer is obvious: it owes the duty to all who may receive detriment by its omission, whomsoever they may be.

The case has been treated as if this duty of giving warning were merely the creature of the statute; if this were so the plaintiffs are entitled to recover, because their case is within the statute. But if there were no statute, a duty would (I express here only my own individual opinion) still lie upon the railway company to give warning of the approach of trains. Railway trains are described in the books as being, what indeed almost every one knows them to be, elements of danger, not readily stopped or turned aside, as some of the judges have said; and it is incumbent on those who use them to use care and skill in their use commensurate with the danger to which their use exposes the lives and limbs and the property of those who may be affected by their use. This is only an application of the well-known maxim: "Sic utere tuo ut alienum non lædas." It follows from this, again giving my own individual opinion, that the duty of giving warning was a common law duty, and that those who suffered injury by the neglect of that duty had a common law right of action against the wrong-doers. The statute only defined how that duty should be performed, and annexed a penalty besides compensation for its non-performance in the way prescribed. It in no way abridged the duty; its purport was to define it. There is not a word in it that points to the abridging of the common law right of those suffering injury through a neglect of duty, or taking away the right of any one who, at common law, was entitled to a remedy. Whether his action would be trespass, or action on the case for consequential damage, is now quite immaterial. I think it very clear that there being no negligence, as the jury have found, a right of action accrued to these plaintiffs, if that accident caused the injury for which the plaintiffs have recovered damages.

In my view, adjudged cases can scarcely be necessary to establish that the right to damages is not confined to actual collision. But adjudged cases are not wanting. There is the case of Fullarton v. Manchester & South Junction R. R. Co., 14 C. B. N. S. 54, which was referred to by the Chief Justice of the Queen's Bench Division during the argument of this appeal. The damage in that case was

to a carriage and carriage horses, and was not the consequence of a collision, but of horses taking freight and becoming unmanageable from the noise and the rushing of the steam caused by the blowing off of steam through the "mud cocks." It was held to be negligence, entitling the plaintiff to recover damages. There is also the case of Longmore *v.* Great Western R. R. Co., 19 C. B. N. S. 183, and the language of the judges in Crafter *v.* The Metropolitan R. R. Co., Jur. N. S. 272, in reference to that case and the case then before the court. These were not cases of collision, and there are several American cases, to which I do not think it necessary particularly to refer.

In no case that I have seen has the test been whether there has or has not been collision; but whether there has been negligence, and injury to person or property as the consequence of that negligence.

There remains to be considered the argument of Mr. Bethune—that if the statute had been complied with, if the bell had been rung or the whistle sounded at the distance or eighty rods from the crossing at the highway, the plaintiffs would still have met with the accident; his argument from this being, as I understand, that the omission to do what the statute requires was not the cause of the injury.

This is a defence that should be made out very clearly. I do not think that the evidence supports it. It seems to be founded upon the evidence of the younger sister. She says that before the accident she would have considered it safe to drive as near as a quarter of a mile from the railway crossing, and would not have liked to drive any horse nearer. I suppose the argument is that if the signal had been given eighty rods from the crossing the plaintiffs could not have reached a place of safety, i.e., a quarter of a mile from where they were, before the train would have reached the spot where its appearance caused the horse to become unmanageable. Take this to be so, it by no means follows that the accident would still have occurred. As things stood, the train appeared at a distance of about 160 feet from the horse; the horse facing it, and seeing it, and struggling to turn round and get away. As things would have been if the warning had been given eighty rods away, the state of things would probably have been materially different. The plaintiffs approached towards the track very cautiously, looking out up and down the track, and listening very intently. They would not, intentionally, be so near the track as they then were. If the whistle had sounded eighty rods away, the course of the elder sister, the driver, would almost certainly have been to turn the horse from the track and drive away from it, and that probably at a much smarter pace than that at which they had been approaching it. At the rate at which the train was going, it would take about two minutes to reach the spot at which its appearance frightened

the plaintiffs' horse; at that time there had been time for the horse to be nearly 1000 feet from the spot where he had faced the engine, and with his back to it; or if he could have reached even half that distance the accident would probably not have occurred.

The conditions are so essentially different between what they were in fact and what they might have been if the proper warning had been given, that it is impossible to say that the accident would have occurred if the warning had been given. That ground of defence appears to me to fail entirely. I agree with Mr. Justice Osler that the whole question of the liability of the defendants is open on the pleadings and evidence under Rule 321 of the Ontario Judicature Act.

Upon the whole, my conclusion is that the appeal should be dismissed, with costs.

HAGARTY, C. J.—I concur in the result arrived at by his Lordship the Chief Justice, but I rest my view not on any common law liability, but on the express provision of the statute, which was intended no doubt for the benefit of the whole travelling community; therefore I think the judgment should be affirmed, and the appeal dismissed, with costs.

BURTON, J. A.—The plaintiffs have recovered a second time, by the verdict of a jury, damages against the defendants for the alleged neglect of a statutory duty to sound the whistle or ring the bell when approaching a crossing, by reason whereof it is alleged that the accident occurred; and it is now contended, and I think with much force, that the defendants did not owe to the plaintiffs, in the circumstances which happenod, any duty to give those signals; and it is, I think, much to be regretted that this question had not been raised by demurrer, and thus, if the objection is entitled to prevail, have avoided the serious expenses which have been incurred in the two trials.

The question is, whether, admitting that a breach of duty has been shown, and admitting, for the purpose of the decision, that there has been a consequent injury, was the Legislature intending to legislate to protect against such an injury, or for an altogether different purpose, that purpose being to give timely notice to persons attempting to cross the railway where it intersects the public highway.

The Legislature, when authorizing the construction of railways, knew that they would be through their whole length frequently adjacent to, and in some places would cross the public highways of the country, and consequently that passengers upon the highways would be to a considerable, and frequently to a dangerous extent, incommoded by the passage of locomotive engines and trains along

the railroad, and that the portion of the public having occasion to use the public highway would sustain some inconvenience for the sake of the greater good to be obtained by the much larger portion desirous of availing themselves of this more expeditious method of travelling or transporting merchandise, by rail.

The Legislature might have annexed any condition to the use of the road by the defendants, as by requiring them to keep a bell or whistle to be constantly rung or sounded.

They have, in fact, annexed a number of conditions, such, for instance, as that the railway shall not be carried along a highway without leave from the proper municipal authorities; that where it crosses a highway it shall not rise above or sink below the level of the highway more than one inch, and that at every crossing at a level sign-boards shall be erected, having the words "railway crossing" painted on them; the erection of fences on each side of the railway, and many other matters; but nowhere except in sec. 104 are they required to blow a whistle or ring a bell. If this section, therefore, had been altogether omitted, the sounding the whistle at the crossing so as to frighten horses waiting to cross the line, would be sufficient to warrant the conclusion that the company was guilty of actionable negligence. See Manchester Ry. *v.* Fullarton, 14 C. B., N. S. 54, referred to by the learned Chief Justice, and Hill *v.* Portland R. R., 55 Maine, 438, where it was held that a company might be held liable for using a steam whistle as a signal for the starting of a train from the station near to a crossing.

In this country the section in question requires that the bell shall be rung or the whistle sounded as the train approaches the crossing, the object being to warn all persons of such approach in season, to enable them to stop at a safe distance, and thus avoid the risk of a collision. No company therefore could be held liable for damages for giving such signal as is required by law when given within the limits named in the statute, but the statute does not authorize or require the sounding of the whistle at any other time or place, and the right or liability at such other time or place depends upon the general principles of law applicable to negligence upon the peculiar facts of each case. The pleadings show and the evidence establishes that the plaintiffs were not, at the time the injury happened, at or near the crossing, but at the distance of about 116 feet from the track, when they were warned by some one that the train was coming, and stopped their horse, which took fright at the engine and ran away, upsetting the buggy to which it was attached, and causing the injury. Whether this was actionable must depend upon the construction of the statute. If the thing here directed to be done, viz., the sounding of the whistle or the ringing of the bell, was enacted for the benefit of persons in the position of the plaintiffs,

then the action lies; if, on the other hand, it was enacted only for the benefit of those persons who had occasion to cross the track, and who were liable to injury from actual collision, then it is not maintainable.

When I say actual collision I do not mean to exclude the case of persons who, having been led by the omission of the defendants to give the statutory warning to approach so near the track as to be in danger of actual collision, have in the exercise of reasonable diligence and care in endeavoring to escape peril sustained injury.

It is of course now well established that where a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss.

Such was the case in Gorris *v.* Scott, L. R. 9 Ex. 125. It is true that, in that case, the statute contained a recital showing the purpose for which the Act was passed, but looking at the provisions of this enactment the purpose and object of them are reasonably clear.

I have pointed out that the Act does not require the bell to be rung or the whistle sounded at or near the approach of any place where the highway runs parallel to or in close proximity to the railway, or where it crosses the railway by a bridge, but only at such places where the railway crosses the highway on a level, or where only there would be danger of a collision of the train with persons or their horses or carriages.

The bell is required to be rung or whistle sounded at the distance of eighty rods from the crossing, and to be kept ringing or whistling until the train has passed such crossing; the time occupied in going that short distance is barely more than sufficient to warn persons about to cross; it is manifest it was only intended to warn such persons, and not persons at a greater distance.

At a crossing it is necessary to give notice to travellers approaching the place of crossing, and before crossing, that they should not venture to do so while the train is approaching; and the warning is given with that object.

Why should a different rule be adopted in the case of persons on the highway approaching the crossing but not intending to cross it, than is applicable to persons travelling upon other highways in immediate proximity to the railway? That these plaintiffs intended to cross the railway cannot affect the question, as they would, if entitled under the circumstances, be equally so entitled if they had no such intention, which would involve this anomaly, that if two highways formed a junction near the crossing, one running parallel to the railway, the other crossing it, the owner of a horse standing on the latter highway taking fright at an engine coming up, under the circumstances which occurred in

this case, would he entitled to recover, whilst the owner of another horse, standing within a few feet of the first but on the other highway, could not; or if it be said that the owner last referred to is entitled to an action, it must necessarily lead to this further anomaly, that when a horse on a road running parallel to the railway is frightened by a train at a distance of eighty-one rods from the crossing, his owner is without remedy, whereas within the distance of eighty rods his right must depend on whether the whistle was sounded or the bell rung; although possibly the accident may have occurred from the circumstance that the whistle was sounded, and would not otherwise have occurred at all.

All statutes are to be construed so as to give effect to the intention as expressed by the words used in them, but that is not to be discovered by considering those words in the abstract, but by inquiring what is the intention expressed by those words with reference to the subject-matter, and the object with which the particular enactment was made.

Lord Justice Turner reviews the whole subject in Hawkins *v.* Gathercole, 6 DeG., M. & G. 21. "Regard, he says, "must be had to the intent and meaning of the Legislature," and then refers with approval to the rule laid down in Stradling *v.* Morgan, Plowd, 204, where it is said: "That the judges of the law in all times past have so far pursued the intent of the makers of statutes that they have expounded Acts which were general in words to be but particular where the intent was particular." And after referring to several cases concludes: "From which case it appears that the sages of the law heretofore construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it; and those which include every person in the letter they have adjudged to reach to some persons only: which expositions have always been founded upon the intent of the Legislature, which they have collected, sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances, so that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion.

For the reasons I have mentioned I am of opinion that the general words used in this section must, having regard to the general provisions of the statute, be intended only for the benefit of those actually crossing, and injured when so crossing, or under such circumstances as I have before mentioned. The plaintiffs claim

for a breach of a statutory duty, and that alone, and looking at the whole scope and object of the enactment, it being clear that it was not enacted for their benefit, they cannot claim damages for the breach of it.

On these grounds I think there was no case to go to the jury, and the plaintiffs should have been non-suited.

The appeal therefore, in my opinion, should be allowed, with costs.

PROUDFOOT, J.—There was contradictory evidence as to whether the bell was rung or not. It was a question peculiarly within the province of the jury. Had the jury found a verdict for the defendants, there was evidence to support it and it would not have been disturbed. There was evidence enough to support a verdict for the plaintiffs. The learned judge told the jury in unexceptional language that they were to make up their minds, "not merely as to the words of the witness, but as to the value to be placed on his testimony." How is it possible to tell what value they placed on the witnesses except from the result of the action —a verdict for the plaintiffs?

The jury also found that the plaintiffs were not imprudent, that they used such care as a reasonably cautious person would, under the circumstances, have used in approaching the railway, and that had the plaintiffs known the train was coming they would have stopped the horse further from the railway. On all these questions I do not think we ought to interfere with the conclusion at which the jury arrived.

But it was argued that these all stopped short of what was necessary to entitle the plaintiffs to recover, and that the jury should have found "that the accident happened because the signal was not given." It appears to me that this is the necessary result of the previous findings, especially when we take into consideration what was present to the minds of the jury when they retired to deliberate on their verdict. They would not have found a verdict for the plaintiffs, which they did, unless they had been of opinion that the want of the signal caused the accident. The learned judge told the jury that the plaintiffs must satisfy them "not merely that the defendants neglected their duty, but that that neglect caused the injury." And again, "it must appear that what happened to them was occasioned altogether by the fault of the railway company." The charge and findings inevitably lead to the conclusion that the jury found that the accident happened because the signal was not given.

It was also urged by the defendants that it was the appearance of the train, not the want of the signal, that frightened the horse. But the signal is not given for the benefit of the horse, but of the driver, and it is found that if the signal had been given the plaintiffs would have stopped further from the railway; and on this

rather indefinite finding the court is justified in assuming that what was necessary to support the verdict was before the jury, and that this finding means that the plaintiffs would have stopped far enough away to prevent the horse from being frightened, or would have placed him where he would not have seen the train.

The question is then reduced to the construction of the statute C. S. C. ch. 66, sec. 104, upon which there was a difference of opionion in the court below, the Chief Justice holding that the liability of the company only arose when a collision had actually taken place. It is not necessary to consider what the liability is in regard to horses being frightened on roads running near to and parallel with the railway, it will be time enough to determine that when the case arises. In this instance the plaintiffs were driving on a road that crosses the railway, towards the railway, and with the intention of crossing it, when the accident occurred. There is nothing in the Act to limit the liability to cases of collision. I agree in the construction placed on the statute by the majority of the Court of Common Pleas.

I think the judgment should be affirmed, and the appeal dismissed, with costs.

Statutory Provisions as to Signals Relate only to Safety of Persons at Crossings.—Statutory provisions requiring the sounding of a whistle before approaching a crossing are intended only for the protection of persons about to use the crossing. They are not intended to guard persons not so using the crossing, and cannot be invoked by them. O'Donnell *v.* Providence, etc., R. Co., 6 R. I. 211; Holmes *v.* Central R. & B. Co., 37 Ga. 593; Elwood *v.* New York, etc., R. Co., 4 Hun, 808; Harty *v.* N. Y. Central R. Co., 42 N. Y. 468; Phila., etc., R. Co. *v.* Spearen, 47 Pa. St. 300; Chicago, R. I. & P. R. Co. *v.* Houston, 64 Mo. 484; Northern Central R. Co. *v.* State, 6 Am. & Eng. R. R. Cas. 66; East Tenn., etc., R. Co. *v.* Feathers, infra. But see Western & A. R. Co. *v.* Jones, 8 Am. & Eng. R. R. Cas. 267.

Memphis City R. R. Co.
v.
League, Admr.

(*Advance Case, Tennessee. May* 17, 1884.)

In an action for the recovery of damages for a personal injury against a street railroad company the court charged as follows:

"It is the duty of the defendant to furnish lights on its cars at night, such as will enable its drivers to see objects ahead on the track, with the aid of the street lights, in time to avoid accident." *Held*, to be error calling for reversal.

The facts are stated in the opinion.

Geo. Gillham for plaintiff in error.

Taylor & Carroll for defendant in error.

COOPER, J.—Action of damages brought by Loague as administrator of Posey Webb, deceased, against the railway company for injuries to the intestate by one of the company's street cars, resulting in her death. The verdict and judgment were in favor of the plaintiff below, and the company appealed in error.

The referees report in favor of affirmance. The exceptions of the company to the report are directed to alleged errors in the charge of the trial judge.

The railway company owns and operates a street railway in Memphis, the cars being drawn by horses or mules. The intestate of Loague, a colored child of the age of two years and nine months, was killed by one of these cars on the night of June 22, 1881, about eight o'clock in the evening. The night was dark, making it difficult to see a small object on the track even at the distance of a few feet, although larger objects, such as a man pushing a baby-carriage, could be seen much farther off. The father of the intestate had put a younger baby in a baby-carriage, and trundled the carriage along the track. The intestate followed the father, and although ordered back by him got upon the track. She was dressed in dark-colored clothing. The company's car was the common street car, properly equipped with lamps on the front end, such as are used on all the street cars of the city, lighted and burning. The driver was standing on the front platform in his proper place, holding the reins in one hand and with the other hand on the handle of the brake. He was looking ahead and saw the father of the intestate with the baby-carriage, but did not see the child until he noticed the mules veering to one side, and then saw a crawling object without being able to distinguish what it was. He immediately reined up the mules put on the brake, and stopped the car in time to prevent the wheels passing over the child; the injuries from which it died being probably inflicted by the single-tree and the brake.

The part of the charge principally excepted to is this: "It is the duty of the defendant to furnish lights on its cars at night, such as will enable its car drivers to see objects ahead on the track, with the aid of street lights, in time to avoid accidents."

The plaintiff in error insists that the charge is too stringent.

While a common carrier of passengers is not an insurer, he is bound to the diligence which a good specialist in his particular line of business is accustomed to exact. His care and diligence must be in proportion to the risk of the machinery he employs and the work he undertakes. Wh. on Neg. s. 627. The same degree of care is not required of the carriers of passengers upon street cars drawn by horses as of railway companies whose cars are drawn by steam. The public have an equal right with the company to travel on the streets, and therefore the company must, in using its franchises, exercise such care and caution for the purpose of avoiding

accidents and endangering property and persons as a reasonable prudence will suggest. 5th Wait Act. and Def. 343. In general the same degree of care as to pedestrians is required of them as of the driver or owner of any other vehicle. Unger *v.* Street R. R. Co., 51 N. Y. 407.

Owing to their momentum and noiselessness the cars are generally required to use bells and display lights. Johnson *v.* Railroad Co., 20 N. Y. 65; Shea *v.* Railroad Co., 44 Cal. 414. These precautionary measures seem intended to put pedestrians on their guard, rather than to aid the company in protecting them, but there can be no doubt that the company is bound to operate its cars in such a manner, if possible, as to injure no one, and to this end to have the ordinary means, such as are usually found adequate and safe. Wh. on Neg. s. 639.

In view of these recognized principles the question is, whether the requirement of the charge does not go beyond the requirement of the law.

It requires the defendant company to furnish such lights on its cars at night as will under all circumstances, with the aid of the street lights, enable its drivers to see objects on the track in time to avoid accidents.

The charge is like so many charges which come before us, upon the objection that it undertakes to lay down a general proposition of law, instead of confining the law to the facts of the particular case. And the proposition itself is open to the objection that it requires a degree of light which might, under some circumstances, transcend not merely what is usually found adequate and safe, but the bounds of science.

Even in the case of steam railroads the companies are only required to avail themselves in the night time of such means and appliances as might be reasonably obtained to enable their employees to see ahead on the track. Nashville & Chattanooga R. R. Co. *v.* Smith, 6 Heisk. 174. And when the night was very dark, and the headlight of the steam-engine was so obscured by rain that the lookout could not see any considerable distance ahead, whereby an accident occurred, this court said:

"We cannot admit that if the light becomes obscured from natural causes, without any defect in the light and appurtenances, without any fault on the part of the employees, that in all cases, as matter of law, the company is to be liable for the consequences." Louisville & Nashville R. Co. *v.* Melton, 2 Lea, 262. The instruction now under consideration would, as a general proposition, hold a street railroad company to a greater strictness than would be required of a steam railroad company.

The facts of the case did not require the enunciation of such a proposition; but we cannot limit the language to the actual facts.

The exceptions to the report of the referees will be allowed, the judgment below reversed, and the case remanded for a new trial.

FITTS
v.
CREAM CITY R. CO.

(*Advance Case, Wisconsin. January* 8, 1884.)

A nonsuit ought not to be ordered if the evidence, construed as favorably as possible for the plaintiff, tends to prove the facts necessary to a recovery.

It is the duty of a street railway company to construct its road according to the most approved plan, and to maintain it by common and approved means, with regard to the necessary convenience of the travelling public in their use of the streets.

Where the catch of a turn-table over which the defendant's cars passed daily was so out of repair as to stand high enough to catch the runner of a sleigh passing over it, it is a question for the jury to say whether it was negligence in the company to continue the use of that style of turn-table when better ones were in common use, and proof of the use and superiority of other turn-tables is pertinent and material, and should be admitted.

APPEAL from County Court, Milwaukee County.

H. H. Field for appellant, Robert C. Fitts.

Winfield & A. A. L. Smith for respondent, Cream City R. R. Co.

ORTON, J.—The county court granted a nonsuit at the close of the testimony of both parties. The rule for granting nonsuits in a case tried with a jury is correctly stated by the learned counsel of the appellant, "That a nonsuit should not be ordered when the evidence, giving it the most favorable construction for the plaintiff that it will possibly bear, tends to prove the facts necessary to a recovery." Schoener *v.* Ins. Co., 50 Wis. 575; Jucker *v.* Railway Co., 52 Wis. 150; Gower *v.* Railway Co., 45 Wis. 182; Spensley *v.* Ins. Co., 54 Wis. 433. The question of negligence of the defendant, or of contributory negligence of the plaintiff, is peculiarly a question for the jury where there is any evidence tending to show either. The court should not take the case from the jury where the evidence would warrant a verdict for the plaintiff. This principle is in consonance with the rule of this court, that a judgment will not be reversed on the ground that the verdict is against the evidence, if there is any competent evidence to sustain it, giving it the most favorable construction in favor of the verdict. To sustain these propositions, we need only refer to the authorities in the very full and able brief of the learned counsel of the appellant. To apply these principles a brief statement of the evidence is necessary.

In February, 1881, the plaintiff was driving along the open and travelled track of Clinton street, in the city of Milwaukee, with a horse and cutter. The street is paved and much travelled. There

are two tracks or double track of a street railway of the defendant along this street, and at a point opposite the defendant's car barn there is a turn-table, with tracks or rails thereon at right angles, and one of these tracks leads to the car barn. The turn-table revolved in an iron rim, on the outer surface in which it turned. There were four notches—one on each side of the table—to fasten the turn-table in this rim, where the catch or latch just fits in when it is down. The catch or latch is from six to ten inches in length, an inch and a quarter or half in width, made of iron or steel, working on the table by a hinge, and held down and kept in place by its own weight only. At this time it was much worn and loose. This table was put down in 1876. Cars ran over it every six or seven minutes. Turn-tables so fastened are not now in use on other roads, and only one of the turn-tables of this kind on the defendant's road, and those now in common use are kept in place by working tightly, and are not easily moved within the rim or groove. Tables like this have been in common use, but have been superseded by the other plan. The travelled track of the street was over this table, and the plaintiff had driven over it before, but never saw the catch or latch out of place. The hinge was much worn, and had never been repaired, and it was liable to stand slanting, and to catch on to the runner of a sleigh passing over it. The plaintiff was driving, not very fast, and less than seven miles an hour, and while passing over this turn-table this catch caught in the runner of his cutter and caused the damage complained of. The catch was so out of place as to stand up considerably above the table.

The statute (section 1862, Rev. St.) which provides that street railways "shall be constructed upon the most approved plan for such roads," is merely declaratory of the common law, and there can be no question but that it is the duty of a street railway company to construct such roads, and all the conveniences thereof, and to maintain them, by the use of the common and approved means, and so as at least to be no obstruction to the use of the street by or to the necessary convenience of the travelling public thereon. The statute in which the common-law duty is declared also provides that "every such road shall be subject to such reasonable rules and regulations as the proper municipal authorities may by ordinance from time to time prescribe." But this does not confer the power upon the city to repeal this general law by ordinance (Horn *v.* Railway Co., 38 Wis. 463; Alton, etc., Horse Ry. Co. *v.* Deitz, 50 Ill. 210); but if it did, there was no evidence that any such ordinance had ever been made.

The duty of using "the most approved plan" does not stop or cease with the original construction. If it were so, then there would be no duty to repair, or to adopt any new plan when the old one had been found by full trial and experience to be inadequate,

insufficient, or dangerous. The most improved methods and plans must be maintained with a view to the public safety. The old plan might at the time of construction have been considered adequate and sufficient, and have been generally in use, but afterwards may have been as generally abandoned, because proved on trial not to be so, and a more approved plan had been adopted, as in this case. Can it be contended that it is not the duty of this company to also abandon such old and insufficient and dangerous plan, and adopt a safer and the more improved plan in general use? But aside from this special duty there is a continuing duty and obligation resting upon the company, in consideration of its use of the public streets, to consult all the time the safety and convenience of travellers thereon, consistent with the full enjoyment of its own privileges and franchises. The company has no greater right to the use of the street than the public, and it being thus a joint use of the street, neither the company nor the public has any right to make it dangerous for either in their proper use of it. "The care and skill to be exercised by the company in the construction and maintenance of their track in a public street are of much higher degree than would be imposed upon them under circumstances of a different character." Mazetti *v.* Railroad Co., 3 E. D. Smith, 98.

It is said that railroads are so much more dangerous than street railways that the degree of care required of them is greater. But if this complaint is true, even street railways may be dangerous to travellers on the public streets as well. The principle cannot be very different so far as the duty, care, and diligence of the company are concerned. Those who travel on the street have a right to suppose and presume that the turn-table of a street railway therein, and over which the travel is accustomed to go, is safe, and properly constructed and maintained. Alton, etc., Horse Ry. Co. *v.* Deitz, supra; Fash *v.* Third Avenue Ry. Co., 1 Daly, 148; 2 Thomp. Neg. 1232.

The true rule is laid down in Read *v.* Morse, 34 Wis. 315, in respect to the duty of a steam-tug owner, requiring him to avail himself of the best methods and latest discoveries of science to prevent the escape of fire, which it was reasonable to require them to adopt; and also in Spaulding *v.* Railway Co., 30 Wis. 110, in respect to the management of railways. The degree of care required in such cases may be very high; but at least a reasonable degree of care is required by the same rule of street railways, and the duty to adopt the most approved plans and appliances is the same in both cases. The case of Wooley *v.* Grand Street & N. R. Co., 83 N. Y. 121, is very much in point as to the use of the public streets for railway tracks and switches. The court said: "It is manifest that it was a question of fact, and to be passed upon by the jury, under proper instructions from the court, whether the defendant

in this case used a switch that was the best for the purpose in general and acknowledged use, and laid down with proper skill and care in a proper manner, and so kept and used it. The defendant might have adopted a kind of switch that experience had condemned, or refused to adopt one that experience had shown to be the best; . . . or, having first put it down well, had suffered it, or the pavement about it, to get out of proper position, so that there was at first or last an obstruction in the public way needlessly or unreasonably dangerous to passers over it. These were questions for a jury to try and determine." McArthur *v.* Green Bay, etc., Canal Co., 34 Wis. 139. In this case, so far as the evidence was admitted by the court, it appeared that the catch or latch on the turn-table was out of place, and projected upward sufficiently to catch the runner of the plaintiff's cutter and upset it. It was old, worn, and loose, and liable to get into that condition, especially when there was snow in the street and on the turn-table. That kind of fastening had been abandoned on the roads of other companies, and of this company also as a rule, and were not in common use, and another plan or method had been generally adopted to dispense with such a fastening. That this catch was out of the notch and so projected upwardly, so as to render travel over it with a sleigh dangerous, tends strongly to prove that it was not at the time a proper appliance for the purpose, and that it was not the right thing to be used under the circumstances.

These facts certainly present the questions whether the defendant was not negligent in not adopting a more approved plan of fastening this turn-table, and whether the company was not negligent in allowing the catch to remain worn and loose, so as to be liable to so project and fasten on the runner of the plaintiff's cutter; and, if the question of notice is in the case, whether the defendant did not have sufficient notice of the condition of the catch when its employees passed over this turn-table every six or seven minutes, and it being directly in front of the defendant's car barn, and cars were frequently run over it into the barn, and every time this catch had to be raised up if it was in place in the notch. These questions were clearly for the jury to decide, and not the court; for this evidence at least tended to prove the negligence of the company. But it is said that the plaintiff was negligent in driving too fast, and ought to have known that this catch was out of place, having before passed over the turn-table. As matter of law, is it negligence to drive with a speed of less than or nearly seven miles an hour in a public street? Is such speed negligence per se? If not, that also was a question for the jury, and not for the court. The plaintiff had not observed that the catch was out of place if he had driven over the turn-table before, and there was no evidence that the catch at that time was out of place. But at any rate it was a question of notice or presumptive knowledge,

which should have been submitted to the jury if there was any evidence of it. So long as the constitution and the laws provide for a jury trial of issues of fact, the right should be guarded and preserved to all parties, where there are controverted facts pertinent to the issues. It would be worse than useless, and a merely ceremonious formality, to impanel a jury in the cause, and, as in this case, to then dispense with their service of rendering a verdict after they had heard all the testimony, and the facts established by it which tended to maintain the plaintiff's cause of action. A nonsuit in such a case as this is not an example to be followed. This unwarrantable nonsuit, on the facts, is sufficient to justify a reversal of the judgment.

But there was certain testimony offered and rejected by the court, the competency of which ought to be determined before another trial. Isaac Ellsworth, a witness for the plaintiff, who had testified that he had been in the street-car business over eight years, and had been connected with the Milwaukee City Railway and was familiar with the details of the street-car business and with the construction of turn-tables, and that he derived his knowledge of turn-tables from the use of them, and that he had seen the turn-table in question, and that he was at the head of the Milwaukee City Railway at one time, was asked, "What turn-tables do you use now?" After objection by the defendant's counsel, the plaintiff's counsel said to the court, "I desire to show by Mr. Ellsworth the kind of turn-tables in use by railway companies generally, and to show that this is not the most approved appliance in use in street railroads." The objection was sustained. He was asked further, "If, with your knowledge of turn-tables, you consider this turn-table here one of the most approved turn-tables in use?" Objection to this was also sustained. He was again asked, "Is there not a defect in this turn-table, and would it not be improved by some arrangement to fasten down the catch?" Objection to this was also sustained. Why? Was not the witness an expert, and were not the questions pertinent to show that the defendant did not use the most approved plan of fastening turn-tables in this instance? The question, "Do you use them?" was obviously introductory only to what the counsel stated to the court he wished to prove. Stephen Kenney, another witness for the plaintiff, testified that he was a carpenter and joiner, and for the last four years had been connected with the Milwaukee City Railway, and that he had made turn-tables for that line; that he had seen the turn-table in question and heard a description of it on this trial. He was then asked, "From your knowledge of turn-tables do you consider that (meaning the turn-table in question) the most approved turn-table in general use?" And again, "Do you consider that, from your knowledge of turn-tables, a safe and proper turn-table?" Objection that the witness was not an expert was sustained. Why was he not an ex-

pert? He had been a builder of turn-tables, and was a practical mechanic, and is presumed to be skilled in building turn-tables, and doing other work in his line. If he was an expert, the admissibility of his testimony in response to these questions was not objected to. Under the authorities there can be no doubt but what both of these witnesses were experts, and but what their testimony in response to the questions would have been competent, pertinent, and material. Carpenter *v.* Central Park, etc., R. Co., 11 Abb. Pr. (N. S.) 416; Payne *v.* Railroad Co., 83 N. Y. 572; Brabbits *v.* Railway Co., 38 Wis. 289. There was no good ground for rejecting this testimony.

The judgment of the county court is reversed, and the cause remanded for a new trial therein.

Tracks of Street Railroads.—As to the obligation of street railroad companies in regard to the condition of their tracks and switches see the following authorities: Galveston City R. Co. *v.* Nolan, 3 Am. & Eng. R. R. Cas. 387; Osgood *v.* Lynn & Boston R. R. Co., 130 Mass. 492; s.c., 3 Am. & Eng. R. R. Cas. 395; Wooley *v.* Grand St. & Newtown R. R. Co., 33 New York, 121; s.c., 3 Am. & Eng. R. R. Cas. 398; Lowery *v.* B. C. & N. R. Co., 76 N. Y. 28; Galveston City *v.* Galveston City R. Co., 46 Tex. 435.

JOHNSON, Adm'r,
v.
ST. PAUL AND DULUTH RY. CO.

(*Advance Case, Minnesota. December* 5, 1883.)

In an action by an administrator against a railroad company to recover damages for the death of plaintiff's decedent, which was alleged to have been caused by the negligence of the defendant, the negligence averred in the complaint was:

(1.) The constructing and maintaining its track in the streets of a city so that the rails and part of the ties were above the surface of the ground.

(2.) The failure to post a flagman at a certain street crossing, as required by ordinance.

(3.) Wrongfully and negligently running its trains without having a brakeman in front of the cars.

Held, that the complaint was sufficient, although it did not appear precisely how the death in question was caused.

APPEAL from an order of the District Court, Washington County.

Marsh, Searles & Nethaway for respondent.

James Smith, Jr. for appellant.

DICKINSON, J.—Action by the administrator of the estate of a person deceased, to recover for the death alleged to have been caused by the negligence of the defendant. The defendant de-

murs to the complaint, upon the ground that it does not state facts constituting a cause of action. The negligence complained of is (1) that the defendant constructed and maintained its railroad through a street in the city of Stillwater in such a manner that the rails and a portion of the ties were above the surface of the street, which was done without authority of law, and constituted a nuisance, and rendered the highway unsafe and dangerous for public use; (2) that the defendant refused and neglected to keep a flagman at a designated point where the railroad intersected the street, to warn persons traveling upon the street, although it had been required so to do pursuant to the provisions of a city ordinance, which is pleaded in the complaint; (3) that the defendant "wrongfully and negligently" ran a locomotive and cars along the street without any brakeman at the forward end of the train, whereby the horse after which deceased was riding was frightened and became unmanageable, causing the carriage to strike the elevated rails of the track, throwing her out and upon the track, where she was killed by the train.

It is further alleged that the death was caused by the defendant's negligent conduct and omission in respect to the three particulars above specified. A railroad company laying its track in a public highway is under obligation to lay it in a proper manner, having regard to the general public use to which the highway is devoted. It may not so perform the work as to unnecessarily obstruct the highway or render it dangerous for public use. The complaint alleges the construction in this case to have been such as to render the highway dangerous for public use, and it does not appear that there was any necessity for such dangerous obstructions. It therefore shows defendant to have violated its duty in this particular. Assuming the ordinance to have been valid,—and no question is raised as to its validity,—it is apparent that the defendant disregarded its duty in neglecting to station a flagman at the crossing. That the defendant "wrongfully and negligently" ran its train without a brakeman in front is a sufficient allegation of negligence. Clark *v.* C., M. & St. P. Ry. Co., 28 Minn. 69; McCauley *v.* Davidson, 10 Minn. 418 (Gil. 335).

The complaint alleges with legal sufficiency a breach of duty or negligence on the part of the defendant in the three specified particulars, and consequent injury. This is enough, although it be not apparent in what way the alleged breach of duty caused the injury. The point that the complaint does not show that the next of kin of the deceased had a pecuniary interest in her life is covered by the case of Barnum *v.* C., M. & St. P. Ry. Co., 30 Minn. 461.

The order overruling the demurrer is affirmed.

NASHVILLE AND CHATTANOOGA R. R. Co.

v.

SMITH, Adm'r.

(9 *Lea's Reports Tenn.*, 470.)

In an action against a railroad company for personal injuries causing death, upon declaration containing two counts, one for failure to observe statutory precautions, and the other for common law negligence, the proof showed that plaintiff's intestate was standing upon a platform about thirty-eight inches high and about two feet from the track at a station which was not a regular stopping point; when the train was about one hundred yards distant, she got down from the platform and began to walk upon the ends of the cross-ties, between the platform and the rails; being warned by a by-stander of her danger, she said, "I think I can make it," but turned and beckoned to her child not to follow her. She was caught by the train before reaching the end of the platform and killed. The engineer testified he did not see her.

1. The circuit judge, at the request of plaintiff's counsel, charged: "If plaintiff's intestate got herself without negligence into a position of danger, she is not to be held responsible for contributory negligence for an honest though erroneous exercise of judgment in getting out." *Held*, this was misleading and erroneous; if the appearances were such as to put a reasonable person in apprehension of danger, and she disregarded them and her death resulted in consequence, this was such contributory negligence as bars a recovery at common law, and mitigates damages under a count for failure to observe statutory precautions.

2. Defendant's counsel asked the court to charge, "It is the duty of an intelligent being to exercise reasonable precaution to avoid danger, and this precaution must be exercised in proportion to the danger and the knowledge of the danger." To which the court replied: "That applies to the common law count, but not to the count for statutory negligence." *Held*, this was error; the instruction requested applies to both counts, the difference being that deceased's violation of this rule would bar the remedy at common law and mitigated the damages under the statute.

3. The court instructed the jury that they might consider as an element of damage, the loss by deceased's children of the society and protection of their mother. *Held*, this was error; this is an action under Code, sec. 2291, and in such case plaintiff can recover only such damage as deceased could claim had she lived.

APPEAL in error from the Circuit Court of Marion County. D. C. Trewhitt, J.

Key & Richmond for railroad.

W. E. Donaldson and N. Burt for Smith.

MCFARLAND, J.—This action was brought by the administrator of Merzy Nunnelly, deceased, for the use of her surviving husband and next of kin, to recover of the railroad damages for injuries causing her death. There was verdict and judgment for the plaintiff for $3500, from which the defendant has appealed in error.

There is no material conflict in the evidence as set out in the bill of exceptions. The deceased was killed by a passenger train on defendant's road, at a station called "Vulcan." At about 2 o'clock in the afternoon, she had been engaged in getting some articles out of a box she had on the platform, when the train came in sight, running on regular schedule time from Chattanooga to Nashville. Vulcan was not a stopping place for that train, and in passing its speed was about twenty miles per hour. After getting the articles, deceased started with them along the side of the track and between the rails and the platform, walking part of the time on the ends of the cross-ties. She was going in the direction of the coming train, and in full view of it. According to some of the witnesses, it was not more than one hundred yards distant when she started—according to others, something further. The platform was thirty-eight or thirty-nine inches high, and the space between the platform and the cars when on the track is said by the witnesses to be from one to two and a half feet. There was another way or path leading from the point where the deceased started to the house of her daughter, where she was then living, but a steeper, rougher way than the route taken by her. After she started, she was spoken to by a bystander and told that she had better get off the track or the train would kill her; this witness says he again said to her, "Don't you see that train coming, it will kill you;" she replied that "it would not," or that she could get off; or, according to another witness, "she guessed she could make it." At any rate she kept on, although she motioned to a little grandson who was following her, to go back. This witness says when the train was within twenty feet of her, he "hallooed" to her again. When near the end of the platform she stopped and leaned up against it, in which position she was struck and killed.

There is proof that she could have gotten off the track and out of the way after she was spoken to, or even at the last moment, by stooping under the platform. Her conduct was so unaccountable as to induce the belief upon the part of some that her death was intentional. The engineer says he did not see her, and did not know that any one had been killed until he reached Tullahoma, a considerable distance away.

There are two counts in the declaration. The first charging a failure to observe the statutory precautions against accidents; the second charging common law negligence.

Among other things, the judge used the following language in his charge: "If plaintiff's intestate got herself without negligence into a position of danger, she is not to be held responsible for contributory negligence for an honest though erroneous exercise of judgment in getting out there. Instructions are applicable to both counts."

This, as we understand it, means that if she honestly thought

she could pass safely between the platform and the train, or get out of the way before the train reached that point, that this was but an error of judgment and not negligence. This was misleading and erroneous. If the danger was patent to a person of ordinary intelligence, and deceased possessed ordinary intelligence and was in the possession of her natural faculties, and voluntarily placed herself in such position of danger, especially after she was directly cautioned against it, then she was guilty of negligence. No matter if she did honestly think she would escape unhurt, it was nevertheless negligence to take the risk.

Again, the judge was requested to say to the jury "that it is the duty of an intelligent being to exercise reasonable precautions to avoid danger, and this precaution must be exercised in proportion to the danger and the knowledge of the danger," to which he responded, "Such is the law applicable to the second count, but not to the first count."

The proposition was applicable to both counts; the difference being, however, that contributory negligence does not defeat the action under the first count, but only mitigates the damages, whereas, under the second count it might defeat the action altogether. The question of contributory negligence was, however, pertinent under either enquiry.

The charge is also erroneous in instructing the jury that in estimating damages, they might take into consideration the loss of social relation of husband and wife, parent and child, etc., and the advice and protection of the deceased as wife and mother.

There are expressions in some of our opinions justifying this charge, to some extent at least. But this is the statutory action given by sec. 2291, et seq., of the code, and is the same action, whether it be brought by the injured party in person or by his administrator after his death. Railroad *v.* Fowler, 9 Heis. 829.

Hence the damages to be recovered are those sustained by the injured party—the action is not for wrongs to the husband or next of kin. The damages are such as the injured party could have recovered, if instead of being killed she had been disabled for life, if not the same amount, at least for the same elements of damages.

Judgment reversed, and new trial awarded.

EAST TENNESSEE, VIRGINIA AND GEORGIA R. R. CO.

v.

HUMPHREYS, Admr.

(12 *Lea's Reports, Tennessee*, 200.)

If incompetent proof go to the jury, and the court afterwards definitely withdraw it, with proper instructions, it is no cause for reversal.

The whole of the charge must be considered in order to a fair test of its correctness.

The Tennessee statutes to prevent accidents on railroads, embody no more than the common law. It never was the legal right of a railroad company to refuse to use all possible means to stop its train and avoid an accident when any person, animal or other obstruction appeared on the track.

The contributory negligence of a person injured on a railroad in going upon the track and falling asleep there, where the statutory precautions were not complied with, may be looked to in mitigation of damages.

It is not error to refuse to charge the jury in a civil suit for damages, that under section 4643, it would require the same character of proof as it would to convict an engineer of a felony.

APPEAL in error from the Circuit Court of Carter County.

W. M. Baxter and John Allison for Railroad.

S. J. Kirkpatrick for Humphreys.

FREEMAN, J.—This suit was brought by the administrator of William Humphreys, to recover damages for killing his intestate by a train of cars.

The declaration contains two counts, the first charges the injuries to be by defendant's servants and employees in charge of a freight train, "unlawfully, carelessly and negligently running the same over the body of the plaintiff's intestate, and so wounding him as to kill him." The second count avers that plaintiff's intestate was upon the track of defendant's road when said freight train was being run thereon by their servants, and being on the track in such way as that he might have been seen by the servants of the company—yet because said servants nor any of them were on the lookout ahead upon the locomotive, and because they failed to sound the alarm whistle, put down brakes and use every possible means to prevent the injury, defendant was run over and killed.

The jury found for the plaintiff, from which judgment the railroad company has appealed in error to this court.

An earnest and ingenious argument is made for reversal on the facts of the case. We need but say, that after a careful examination of the testimony, there is not only ample testimony to support the verdict under the rules of this court, but a probable preponderance in favor of the finding of the jury. The theory of the plain-

tiff in the testimony is, that the boy killed was lying ten or twelve feet west of a cattle-gap on the road—probably asleep—we think the facts show he had wrapped himself in a quilt or shawl and gone to sleep on the track, as the witnesses on both sides agree he had the covering about him when he was struck. The plaintiff sought to show that the boy, in this position, could have been seen by any one on the lookout on the locomotive. That this is true is beyond question.

It is claimed by plaintiff that there was no lookout, and by reason of this neglect, the boy was not seen until the train was so near him as to render it impossible to check the train. If the facts be as plaintiff claims, it is certain there was no lookout, or he failed of his duty. The defendant's proof goes on the same view, as to the time he was seen—that is, when the train was too near him to stop it. But the engineer and other witnesses for the defendant insist the boy was lying in the cattle-gap on one of the pillows, and only raised himself up so as to be seen when the engine was from twenty to thirty yards of him.

These witnesses swear he was first seen lying on his side, resting on his elbow, with head above the rails, looking directly at the engine when the whistle blew, and the engineer says he lay unmoved, in this position until he was run over. That he saw him last in this position when the pilot was in from one foot to two feet of striking him. This is incredible. The jury were well warranted in disregarding the story. The boy is shown to have been twelve years old, intelligent and sprightly. He is shown to have been cheerful an hour or so before this, engaged in the boyish sport of vexing a calf by throwing a sack over it and laughing over its alarm. It is contrary to all human experience, that such a boy would calmly rest himself on his arm, and look an engine in the face without moving, while it ran over him. A madman would scarcely have been so reckless and cool—a boy of twelve years, in good health and of sound mind, never. This is the sole theory of defendant in the testimony.

The plaintiff proves by witnesses who saw where he was lying, and saw the engine strike him, that he was lying on the track beyond the gap, and this testimony is abundantly corroborated by the facts. The verdict must stand unless there be error of law.

We proceed to dispose of the supposed errors of law urged on our attention. We do not deem it necessary or proper that we should elaborately discuss all of them. While we can appreciate the zeal of counsel, and feel the ability and ingenuity exhibited by them, yet as a court we cannot see the need of arguing at length questions which we have settled so often that further discussion is a work of supererogation.

We shortly dispose here of one question. It is insisted that the admission of a transcript showing that Johnson City was an "in-

corporated taxing district," and proof of the fact that the collision and killing took place within a mile of that place, and then only withdrawing this evidence in his charge to the jury, is reversible error.

There is nothing in this. While it is desirable that none but competent testimony should be permitted to go to the jury, yet, as we have often held, if such should go, and the court should afterwards definitely withdraw it from the jury, with proper instructions, it is no cause for reversal. In some cases, where the testimony was of such a character as to inflame the passions or arouse the prejudices of a jury, as in a case soon after the war, where proof was made of a party being a rebel, we have intimated, if not held, such cases might be exceptions.

But this is not such a case. The distance from Johnson City is proven as any other fact in the case, and might well have been competent in any view, as showing where the accident occurred. The other fact that Johnson City was incorporated is a simple and single fact easily seen and understood by the jury. No possible prejudice could be excited by the proof of these facts. His Honor in definite terms withdrew this testimony in his charge, telling them they were not to consider it, pointing out the statute and section of the code under which it had been admitted.

As we have said in several cases, the requirements of sec. 1166, and sub-sections, embody no more than the common law, and every other enlightened system of jurisprudence demands at the hands of every citizen. The statute has only shifted the burden of proof. It never was the law that any citizen would not be responsible if he saw another on his track, even a trespasser, and rode over him when he could have avoided it. It never was the legal right of a railroad company to refuse to use all possible means to stop its train and avoid an accident when any person, animal or other obstruction appeared on the track. A collision in such case is almost certain death to man or animal. If it be other obstruction the lives of persons on the train would be imperiled, so that in either case the duty to check the train and avoid an accident is but the dictate of common sense as well as humanity. The opposite view would involve the proposition that a railroad company might at its option kill or maim any trespasser on its track when it could have avoided doing so. The statement of the proposition is to refute it.

His Honor, in order that the jury might have the qualifications of the rule given, repeats the proposition that impossibilities are not required of railroads.

On the question of what is called contributory negligence, his Honor instructed the jury clearly, as has been repeatedly ruled by this court, a summary of all our decisions having been made at this

time in the case of East Tennessee, Virginia and Georgia R. R. *v.* Fain, 12 Lea, 35, by Judge Cooper.

The same may be said of the question of mitigation of damages in case the deceased was also guilty of negligence, and they were directed that such negligence was to be considered in mitigation of damages in proportion as they should find it slight or gross. In fact we think the charge as given was as distinctly applicable to the issues made in the case as any we have seen, and then out of abundant caution the jury were told that the fact that "defendant was a corporation was not to weigh in the least with them in coming to a verdict." Answers of his Honor to instructions requested by counsel are urged for refusal.

There is first a general request to instruct the jury specifically, and as applied to the facts of this case, what would constitute contributory negligence on the part of the deceased William Humphreys, and how far and in what way such contributory negligence, if any, must be looked to by the jury in assessing damages.

His Honor might well have declined to make any response to this request, as it presented no principle of law for his action, and he had charged the rule already. Besides he had charged on the precise question, and properly. He, however, did give a case of contributory negligence by saying "If the evidence should show the deceased voluntarily went on the track, not at an established crossing, with knowledge that a train was likely soon to pass, and laid down upon the track, and went to sleep, that would be such contributory negligence as the jury should take into consideration in estimating damages, provided they found the company had failed to comply with statutory regulations." He adds, the damages should be mitigated in proportion as the negligence of plaintiff was slight or gross. Some criticism is made on the statement that if he knew a train would soon pass on, and had gone to sleep. But this is simply hypercritical. It is a fair response to the general request, and in fact is strictly applicable to the main facts of the case as made by plaintiff. The boy lived within a few hundred yards of the road, knew the time of its trains, and was probably, if not certainly, asleep. The case put is a case of contributory negligence, and if defendant wanted more specific instructions as to other phases of the case, it was the duty of counsel to point out by specific request what was sought. There is nothing in the question made on this point. Objection is taken to the fact that witnesses for plaintiff are shown to have been in the office of counsel of plaintiff the day before the trial, and there to have given statements in each other's hearing of what they knew of the case, his Honor telling the jury they could look to these facts and give them such weight as they thought they were entitled to under the circumstances shown in the proof. This was certainly all that

could have been asked properly. In fact we do not see that it was of special import in any aspect of it.

The only other request was based on the proposition that by section 4643 of the code it is a felony for a person connected with a train to fail to observe the precautions prescribed by statute, whereby any person shall be killed. It was in substance that it would require the same character of proof to convict an engineer of a felony under the statute referred to as to make out a case for damages as against a railroad company in this case, the only difference being in the criminal case that the State would have to make out the facts beyond a reasonable doubt, and in the civil case it must be made out by a preponderance. We only say of this that we take it the learned counsel who present this objection could not very earnestly insist it ought to have been charged. In fact it would have been wrong had it been given, and could only have served to confuse the jury by introducing the case of a criminal trial, and the rules of law applicable in such a case in a civil case to which they were not applicable. There was no error in this.

We only add, that the amount of the verdict, $3500, the damages claimed being $20,000 for killing a poor boy only twelve years of age, whose expectation of life was many years—and that, as the jury have found by a violation of an express statutory requirement, a reckless neglect and oversight, shows that they have no doubt given all proper weight to his Honor's direction, to mitigate the damages in proportion as the negligence was slight or gross.

The Commission of Referees have recommended a reversal of this case on the ground that in his Honor's reply to the general request No. 1, to state the rule as to what constituted negligence, his Honor only stated the rule as applicable to plaintiff's case, when he gave the case of the boy asleep on the track. That he ought to have also given the rules applicable to defendant's theory on this subject of mitigation of damages. In this they erred. First, because defendant had no theory of the case based on the idea of mitigation of damages. Its whole case rested on the ground, that the boy was concealed, so that it was impossible to see him, until absolutely too late to avoid the accident. Take all this proof as true and this case is made out—nothing else is claimed.

In the next place, no further request was made for any such instructions as is suggested by the referees should have been given, as we have shown. What was said was true as far as it went. His Honor was not called on to repeat his charge or go over the case again.

We have gone over the questions made with perhaps unnecessary particularity. We find the case one, conceding the proof of

plaintiff to be credible, of gross negligence on the part of the servants of the company. A boy, in plain view, is run over and crushed, when if there had been a lookout, he might have been seen in time to have stopped the train and then avoided the accident. The jury have believed this testimony, and after examining it, we see not the slightest tinge of untruthfulness of purpose on the part of the leading witness of plaintiff. The leading witness of defendant is weakened by an inherent defect in his story, so as to show it incredible. No jury on these facts could have failed to find for plaintiff.

The report of the referees will be set aside, and the judgment of the court below affirmed.

We can see no possible influence the testimony could have had on the jury. The case stood well proven before them on the real theory of the plaintiff in its proof, that there was negligence in not having a lookout on the locomotive, and needed no support from this direction. In fact the case of plaintiff would not have been as strong on the ground presented in the objection, as the engineer swears definitely he was blowing the signal of approaching a town as required by the statute referred to, and there is less to contradict him on this point than on the other issue.

It is next objected that his Honor charged erroneously, when he is quoted as saying: "Therefore if the statutory precautions have not been observed, the railroad company would be liable, although it may appear that the observance of them would not have prevented the accident." He qualified this, however, in the next sentence by saying: "But if a person or animal, or other obstructions, should appear upon the road so suddenly as to make it impossible to perform all the statutory precautions, the company would not be liable for an accident provided its agents and employees did all they could at the time to prevent the accident."

We need scarcely say the whole of what a court charges must be taken in order to a fair test of its correctness. Every proposition cannot be stated in one sentence or at the same time. That the statement of the law by his Honor is correct, no reasonable mind, it seems to us, can doubt.

Tennessee Statute to Prevent Accidents on Railroads.—The Statute of Tennessee referred to in the principal case is as follows: "Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead, and when any person, animal or other obstruction appears upon the road, the alarm-whistle shall be sounded, the brakes put down and every possible means employed to stop the train and prevent an accident." The burden of proof is on the railroad company to show that the statutory requirements have been complied with. The statute stands alone in railroad legislation. A railroad is liable where an accident happens when it has disregarded its provisions, even though the accident would have inevtiably happened had all the statutory precautions been adopted. The contributory negligence of the person injured is no bar. Louisville, etc., R.

Co. v. Burke, 6 Coldw. 45; Smith v. Nashville, etc., R. Co., 6 Coldw. 589; s. c. 6 Heisk. 174; Nashville, etc., R. Co. v. Prince, 2 Heisk. 580; East Tennessee, etc., R. Co. v. St. John, 5 Sneed, 524; Railroad Co. v. Walker, 11 Heisk. 383; Louisville, etc., R. Co. v. Connor, 9 Heisk, 19; s. c. 2 Jere Baxt. 382; N. & C. R. R. Co. v. Smith, 6 Jere Baxt. 174.

The usual rule that the railroad employees may presume that a person on the track will get off in time to save himself from danger is disregarded. Hill v. Louisville, etc., R. Co., 9 Heisk. 823.

It is also settled, however, that even where the statute is not complied with, the contributory negligence of the person injured may be shown in mitigation of damages. Smith v. Nashville, etc., R. Co., 6 Heisk. 174; Hill v. Nashville, etc., R. Co., 9 Heisk. 823; Railroad v. Walker, 11 Heisk. 383; Louisville & N. R. Co. v. Connor, 2 Jere Baxt. 302; N. & C. R. Co. v. Smith, 6 Jere Baxt. 174; N. & C. R. Co. v. Newlin.

As to the construction of the statute generally, see Moran v. N. & C. R. Co., 2 Jere Baxt. 379; N. & C. R. Co. v. Troxlee, 1 Lea, 520; N. & C. R. Co. v. Anthony, 1 Lea, 516; E. T., Va. & Ga. R. R. v. Scales, 2 Lea, 688; L. & N. R. P. Co. v. Melton, 2 Lea, 262; Railroad Co. v. Swanly, 5 Lea, 519; Railroad Co. v. White, 5 Lea, 50; Railroad Co. v. Selcer, 7 Lea, 557; Dinwiddie v. Railroad Co., 9 Lea, 309; Railroad Co. v. Feathers, 10 Lea, 103; Holder v. Chicago, St. L. & N. O. R. Co., 11 Lea, 176; Railroad Co. v. Reidmond, 11 Lea, 205.

Falling Asleep upon Track is Contributory Negligence.—The act of falling asleep or being drunk and incapable upon a railroad track is generally held to be such contributory negligence as will preclude recovery in case of accident. Herring v. Wilmington, etc., R. Co., 10 Ire. L. (N. C.) 402; Manly v. Wilmington, etc., R. Co., 74 N. C. 655; Illinois, etc., R. R. Co. v. Hutchinson, 47 Ill. 408; Richardson v. Wilmington, etc., R. Co., 8 Rich. L. 120; Felder v. Louisville, etc., R. R. Co., 2 McMull. (S. C.) 403. But see Indianapolis, etc., R. Co. v. Galbreath, 63 Ill. 436; Houston & T. C. R. Co. v. Sympkins, 6 Am. & Eng. R. R. Cas. 11; Marcott v. M. H. & C. R. R. Co., 8 Am. & Eng. R. R. Cas. 306; Meeks v. Southern Pac. R. Co., 8 Am. & Eng. R. R. Cas. 314.

But it is of course to be understood that when the servants of the company fail to exercise due care after becoming aware of the plaintiff's dangerous position, the company is liable notwithstanding plaintiff's contributory negligence.

LEVOY
v.
MIDLAND RY. CO.

(3 *Ontario Reports*, 623.)

The defendants were required by law to station a man on the last car of every train moving reversely in any town, to warn persons standing on or crossing the track of the approach of the train. *Held*, that the defendants did not comply with this direction by having a man at the front end of the last car, where he could not see persons crossing the track.

In this case there was no brake at the rear end of the last car. The brakeman on the last car, seeing the track clear a few minutes before the accident,

went to the front end, and the plaintiff then attempting to cross, was injured. *Held*, evidence of negligence to go to the jury.

ACTION for negligence. Trial at the last Fall Assizes, at Lindsay, before Hagarty, C. J., and a jury.

Defence: not guilty, by statute.

The facts shortly were, that a train of cars belonging to the defendants was moving reversely along a street in the town of Lindsay. The plaintiff, a child of six years old, was lawfully and without negligence on his part crossing the track in front of the train, where, as he said, his foot caught in the track, and he worked and worked, and could not get it out, and he had to let the cars go over it. A brakesman was on the last car, a passenger car, at the time, but not at that end of it where the accident happened. He said he had been at that end just before, and, seeing the track all clear, had gone back through the car to the other end. When he got there he again looked out, looking under the car, and saw the boy struggling on the track. He at once put on the brakes, and stopped the car in about a car length or so. He had not seen the boy approaching the track. It also appeared that the brake at the rear end of the car was useless; but the train hands said that even if it had been in working order the brakesman could not possibly have pulled up the train with it in time to have prevented the accident. There was other evidence which for the present purpose it is unnecessary to consider.

The jury found a verdict of $1000 for the plaintiff.

Bethune, Q. C., and Biggar, moved to set aside the verdict, and enter a nonsuit, on the ground that there was no evidence to go to the jury, and that there was contributory negligence.

They contended that the boy saw the train, and could have avoided the accident, and had all the warning a man could have given him, even had the latter been differently placed on the train.

Hudspeth, Q. C., contra.

OSLER, J.A.—The only question is, whether there was any evidence of negligence which could not properly have been withdrawn from the jury. If there was, the motion for the nonsuit must fail, and the defendants say they do not press for a new trial.

The defendants are required by law to station on the last car of a train moving reversely in any town, etc., a person who shall warn parties standing on or crossing the track of the approach of the train. I think a jury might properly be told that a man inside such a car attending to the stove, or looking after the passengers, or outside of it attending to the brakes at the end nearest to the engine, could not be said to be a person stationed on the car for the purpose of giving warning, etc., and in the charge of the learned Chief Justice in this case, it was properly assumed that the

company were wrong in not having a man at that end of the car where only he could be of any use for that purpose. Therefore, when the accident happened, the defendants were failing to comply with the express provisions of the statute, and that was an act of gross negligence. See per Amphlett, B., in Williams *v.* Great Western Ry., L. R. 9 Ex. 162. The jury were asked whether the want of this precaution was the cause of the accident, and I think they might not unreasonably infer that it was, or that the accident might but for this act of negligence have been prevented, as the brakesman said that when he left the rear end of the car to attend to his other duties at the opposite end, the plaintiff was not in sight. The latter must therefore have approached the track and begun the attempt to cross while the former was passing through the car. Had he remained stationed at the rear of the car he would in all probability have seen the plaintiff approaching or about to cross the track, and might have been able to warn him in time.

Again, considering that one of the brakes was defective, and that there was but one man to perform the double duty of warning the public and of braking the car, I think the jury might well have been asked whether in these circumstances—the train being propelled along a public street where children and others were likely to be crossing, and moving up and down at any time—there was a neglect of what might fairly and reasonably have been expected from the railway company for the protection of the public. If the jury thought there was, and that the accident resulted from it, I cannot say there was not evidence to justify such a conclusion.

In Stokes *v.* The Eastern Ry. Co., 2 F. & F. 695, Cockburn, C. J., directed the jury thus: "Lastly, even assuming that the accident was not caused by the company's servants, might it have been prevented or mitigated by a better use of brake-power? It is not to be disputed, because the universal use of brake-power is an acknowledgment of its necessity, . . . that brake-power ought to be used. Are you of opinion that the absence of a second brakesman, or the not putting the single one on the rear, was negligence on the part of the company? You must consider the question as practical men, and if you think there was a neglect of what might fairly and reasonably have been expected from the railway company . . . that would be negligence."

I think the case was rightly left to the jury, and that the order nisi should be discharged.

STATE OF MARYLAND TO USE OF BARNARD

v.

PHILADELPHIA, WILMINGTON, AND BALTIMORE R. R. CO.

(*Advance Case, Maryland.* 1883.)

A, a man of intemperate habits, was found dead at the close of a sleety and rainy night on a bridge belonging to a railroad company constructed across a street. The bridge had a platform on one side of the track, which was a continuation of a platform used for freight. It was little employed by passengers. A was accustomed to cross the bridge very often, and was last seen on the night in question at the station on one side of the bridge drunk. His body was found in the morning alongside of the platform on the bridge jammed between two crossties, over which no planks had been placed. In an action against the railroad company to recover damages for A's death, *Held*, that there was no evidence of negligence on the part of the company, and that therefore the defendant was entitled to judgment.

H. A. Stump, Jas. P. Gorter, and H. McCullough for the plaintiff in error.

Alexander Evans and William J. Jones for the defendant in error.

IRVING, J.—The only ground upon which the appellant's counsel have claimed a reversal in this case is, that the Circuit Court erred in taking the case from the jury, by an instruction that there was no legally sufficient evidence that the death of John R. Barnard was occasioned by the defendant's negligence; and the only negligence of which they contended there was evidence that the bridge over Union Street, in the town of Havre de Grace, was not entirely covered with plank.

The facts are few, simple, and uncontroverted. On the morning of the 15th of December, 1881, the deceased was found dead upon a bridge of the appellee built over Union Street in Havre de Grace. He lived at Perryville, on the other side of the Susquehanna River. He had been an agent of the railroad at that place for some years, but had been discharged sometime before his death for intemperance. He was consequently perfectly familiar with the road and the localities around the place where he was found dead. He had been accustomed to walking across the bridge frequently by day and by night, and at all times of the night. He was in Havre de Grace the night before his discovery on the bridge dead, and was drinking. He was last seen, near midnight, in the neighborhood of the ticket office or station, and witness thought he was "pretty tight." He was advised not to attempt to walk across the bridge that night, but he insisted he would go home. When last seen he was at the proper passenger platform

in front of the station house. When found he was on the other side of the railroad track, between the south platform and the railroad track. He was caught between two crossties outside the railroad track and between it and the platform on that side. He had slipped down as far as his hips. His body was bent forward toward Perryville, his breast on one crosstie and his head on the one next beyond. One shoe and stocking were off, and with his hat and flask of whiskey (which was still corked) were found in the street below. His neck was broken, and there was a wound on the back of his head and one on his left shoulder, and his shins were bruised. The deceased had one lame foot, which was painful, upon which he wore a large and untied shoe. He said of that that if he "took his shoe off and let the fresh air strike it, it was not so painful." How he came where he was, or in the condition in which he was, no one knew. It was unexplained. Nobody had seen him go there or saw him there till he was found dead. The theory of the plaintiff was that he went there to board the train to cross the river, and because the bridge was uncovered he fell between the crossties and was struck by a train and killed. That is bare presumption. The officers of no train saw him. There seems to be no greater warrant for that presumption than that he was walking the bridge to his home, and fell in as he was found, or sat down to cool his foot in a besotted condition and was killed. There is certainly no evidence on the subject. It was a bad night. It was raining and sleeting. This bridge was a continuation of the bridge over the river. Crossing from Perryville the bridge connects with a high bank at Havre de Grace, which it reaches by crossing Union Street nearly at right angles, and above grade to the height of fifteen feet above the street. The station-house at Havre de Grace is at the end of the bridge, and on the north side of it. On this side along the track in front of the station-house, extending for several hundred feet, is a platform for passengers to get off and on trains going in either direction. On the south side there is a platform also on the bridge on which passengers have sometimes alighted from trains going south, and occasionally boarded going south, but which is not convenient, because of the necessary position of passenger coaches for boarding cars going north, and which was seldom used by any one going north; and it does not appear in the proof it was held out by the company as a platform for that purpose. It seems to have been used mainly for freight. The evidence shows that passenger coaches overlap this platform several inches. Beyond the covering of the platforms there is no plank on the crossties or sills of the bridge, but the spaces between are open. But by reason of the overlapping of the coaches there is no chance of a person on the platform getting into these spaces except, perhaps, between the coupling space between the cars. All the counts in the narr

charge the negligence to consist in leaving these crossties unplanked; and the plaintiffs have insisted that Barnard was at the place where he was found for the purpose of boarding the train, and in the attempt fell and was killed by the train by reason of his neglect. Of this we have seen there was no proof, but it rests wholly in assumption. We have been cited to no provision of the defendants' charter obliging them to construct the bridge in a particular way which has been violated. There has been nothing introduced to show that this bridge, which was for railroad uses, was required to be made safe for people to walk over. There is no evidence that this bridge is not constructed in the usual way that railroad bridges are built, and that it was not well and safely constructed as and for such a bridge. The bridge is private property, and we have been cited no law appropriating any part of it to use as a public highway for any other purpose than transit on the cars. The whole case rested in conjecture, and there was no case made for the jury. The cases in this State are numerous which decide that the onus of proving the negligence which occasions the injury sued for is on the plaintiff, and that there is no presumption of negligence. Bohe's case, 28 Md. 647; Foy's case, 54 Md. 648; State, use of Miller, *v.* B. & O. R. R., 58 Md. 222; Bacon's case, 58 Md. 484, etc.

Judgment affirmed.

See Mason *v.* Missouri Pacific R. R. Co., 6 Am. & Eng. R. R. Cas. 1; Teunenbrook *v.* Southern Pacific R. R. Co., 6 Am. & Eng. R. R. Cas. 8; Louisville, etc., Canal Co. *v.* Murphy, 9 Bush. 522.

Dinwiddie, Adm'r,
v.
Louisville and Nashville R. R. Co.

(9 *Lea's Reports, Tennessee*, 309.)

An affidavit that there was not kept by the clerk a jury and non-jury docket cannot be looked to. It should appear from the statement of the presiding judge as a part of the bill of exceptions.

The statutes require, when obstructions appear upon the road, that the alarm whistle should be sounded but does not specify the number or character of whistles, and the question is reserved whether if an engineer sounded for brakes, that would be a compliance with the statute.

The statute does not specify the number of brakesmen there shall be upon the train. This is a regulation left to the railroad company, which must be reasonable and in conformity with general usage and the course of business of railroads. To require one brakesman to each car is unreasonable.

Appeal in error from the Circuit Court of Henry County.

J. N. Thomason for Dinwiddie.

Cole & Sweeney for Railroad Co.

McFarland, J.—This action was brought by the administrator of Felix R. Hagler, deceased, for the use of his next of kin, to recover damages for injuries by the railroad company causing Hagler's death. The cause was tried by the judge without a jury, and the issue upon the plea of not guilty found in favor of the defendant, and judgment rendered accordingly. The plaintiff moved for a new trial, which was refused. He thereupon took a bill of exceptions, setting forth the evidence heard upon the trial, and appealed in error.

The first ground of error assigned is the action of the court in trying the cause without a jury. The plaintiff's declaration was filed the 28th of May, 1879, and his replication to the defendant's plea on the 3d of June thereafter, and neither contains any demand for a jury. This, according to the terms of the act of 1875—which we have held to be a valid and constitutional regulation of jury trials—was a waiver of the right to a trial by a jury. It is argued, however, that the statute should not have been enforced in this case, for the reason that its requirements in regard to keeping a "jury docket" and a "non-jury docket" had not been complied with by the clerk.

If, however, this would affect the question—as clearly it would not—there is nothing in the records to show the facts assumed. The fact, it is true, is stated in an affidavit copied into the transcript, but the affidavit is not made part of the record by bill of exceptions, and cannot be looked to. Besides, a matter of this sort, when material, should appear from the statement of the presiding judge as part of the bill of exceptions.

We have several times held that we will not look to the affidavits of the parties in regard to facts transpiring in the presence of the court and as part of its proceedings, of which the judge may be supposed to be cognizant, unless the bill of exceptions indicates that the judge really intended to certify the facts stated in the affidavit.

All that appears of record on this question is the plaintiff's motion to transfer the cause to the jury docket, which was entered and refused on the 1st of March, 1880. There is in fact nothing to show that when the cause was tried on the 8th of June, 1880, a jury was demanded.

The next assignment of error is the action of the judge in sustaining the defendant's objection to the question asked by plaintiff's counsel of one of its witnesses to this effect; immediately after Hagler had been run over the train was stopped and the engineer, conductor, and other train hands had gathered around the body which was still breathing; the witness was asked, "what statements were made around the body by the operatives of the train as to how the killing occurred." We think it requires neither argument nor authority to show that there is no error in this. It is

not shown what statement the plaintiff proposed to prove, and besides it would have been but the declarations of persons not parties to the cause, as to facts which they were competent witnesses to prove, but as to which they could make no admission binding on the defendant.

It is next insisted that the finding of the trial judge is not sustained by the evidence. The fact that Hagler was run over and killed by defendant's train was not denied. The proof indicates that he was drunk and had fallen or lain down upon the track at a late hour in the night and was probably asleep, and in this condition was run over and killed. The finding for the defendant was no doubt upon the ground that the agents and employees of the road had complied with all the requirements of the Code, sec. 1166, which in such cases exonerates the company. It is insisted that the proof fails to show a compliance with the statute in this; the act requires a look-out to be constantly kept . . . "and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident." It is argued that the proof shows that when an obstruction is discovered upon the road, the engineer sounds what is styled a "call for brakes," being either one, two, or three short whistles, according to the imminence of the danger; and in addition he sounds what is called the "alarm whistle," a series of successive whistles, to alarm or frighten off stock, and the latter duty was not performed in this case, that the engineer only sounded the call for brakes. The statute does not specify the number or character of the whistle; it only says, the "alarm whistle." The call for brakes is, according to the proof, an "alarm whistle." But we need not in this case determine what would be a compliance with the statute in this respect, for the reason that there is proof showing that the engineer "sounded the alarm and called for brakes" —in the language of one witness, "sounded the alarm and called for brakes violently." So that even upon the assumption contended for, that the "alarm whistle" means a whistle distinct from a call for brakes, there is proof in the record that the statute was complied with. We need not determine the weight of proof on the question—it is sufficient that there is proof to sustain the verdict.

It is next insisted that the statute was not complied with in regard to brakes; that the train was composed of six freight cars with brakes upon each car, but that there were only three brakesmen, whereas with a brakesman upon each car the train could have been stopped sooner. The proof is that there was the usual number, and considered sufficient for any train. The statute does not specify the number of brakesmen, and we are of opinion that this is one of the regulations that must be left to the railroad companies, provided their regulations are reasonable and in conformity

with the general usage and course of business of railroads, and are such as contemplate a compliance with the statute according to its fair import and meaning. To require one brakesman to each car would be so contrary to all usage in this respect, and so unreasonable in itself, as to make it reasonably certain that the legislature did not intend to impose any such requirement.

There is no error in the record, and the judgment will be affirmed.

Brakemen.—It is negligence per se for a railroad company to run its trains without a sufficient number of brakesmen to insure safety. Toledo W. & W. R. Co. v. McGinnis, 71 Ill. 346; Kansas Pacific R. Co. v. Pointer, 14 Kans. 37; and see Stoddard v. St. Louis, K. C. & N. R. Co., 65 Mo. 514; Booth v. Boston & Albany R. Co., 67 N. Y. 593; s. c., 73 N. Y. 38; Harvey v. New York Central & H. R. R. Co., 19 Hun. 556; Mad River & L. E. R. Co. v. Barber, 5 Ohio St. 541; Hayes v. Western R. Co., 3 Cush. 270; Indianapolis B. & W. R. Co. v. Carr, 35 Ind. 510.

WATSON
v.
FORTY-SECOND STREET AND GRAND STREET FERRY R. R. CO.

(93 *New York Reports*, 522.)

Plaintiff was injured by reason of defendant's negligence in April, 1877. She commenced this action to recover damages in January, 1880. *Held*, that the statute of limitations was not a bar, as the case was governed by the three years limitation prescribed by the Code of Civil Procedure; not by the one year rule previously existing; that the case was not within the exceptions in the provision of said Code, making the rule of limitations therein prescribed the only one thereafter applicable to civil actions, except where a person was entitled, when the Code took effect, to commence an action, and did so within two years thereafter.

APPEAL from judgment of the General Term of the Superior Court of the city of New York, made at the November term, 1881, which affirmed a judgment in favor of plaintiff, entered upon a verdict. Reported below, 16 J. & S. 44.

The nature of the action and the facts pertinent to the question discussed are stated in the opinion.

Moses Ely for appellant. The court erred in holding that the right of action was not barred by the statute which governed before the Code of Civil Procedure took effect. Code of Procedure, § 94; Laws of 1876, chap. 431, § 7; McCluny v. Silliman, 3 Peters, 270; Sedgwick on Stat. and Const. Law, 321; Bell v. Morrison, 1 Peters, 360. It is not enough that the language of the statute would bring this case within its operation if such were not the intent of the legislature. People v. Railroad Co., 3 Kern. 81; Gris-

wold *v.* Insurance Co., 3 Cow. 96; Bac. Abr., tit. Statute, 1; 15 Johns. 380; Collins *v.* Ralli, 20 Hun, 246–256; Acker *v.* Acker, 81 N. Y. 143–149; Dilger *v.* Palmer, 27 Alb. L. J. 115.

A. G. Vanderpoel for respondent. Section 94, subdivision 2, of the Code of Procedure, being repealed by Repealing Act of June 5, 1877, for the purpose of this action is dead, and cannot for that reason maintain against the plaintiff. Butler *v.* Palmer, 1 Hill, 332; Dwarris on Statutes, 676; Guillotel *v.* Mayor, etc., N. Y. Ct. App., January, 1882; 10 Abb. N. C. 319, 321, 322.

Danforth, J.—By reason of defendant's negligence the plaintiff was injured on the 18th day of April, 1877, and on the 15th day of January, 1880, commenced this action for the recovery of damages then sustained. At the trial the only defence relied upon was the statute of limitations, and that being overruled, the jury rendered a verdict in her favor.

The trial court committed no error. At the time of the injury such cause of action could be prosecuted only within one year after it accrued (Laws of 1876, chap. 431, § 7), but by the Code of Civil Procedure (Chap. 4, title 2, § 383, subd. 5), the period of three years was substituted, and the former statute repealed. This act took effect September 1, 1877, and thereafter constituted the only rule of limitations applicable to civil actions (§ 414), except certain enumerated cases, and among others one in which a person was entitled, when the act took effect, to commence an action, and did so within two years thereafter.

The appellant relies on this exception. Its meaning is not clear, but it is obvious that it has no application to this case. No action was commenced by the plaintiff within two years after the act took effect, and for that reason if no other, the condition upon which the exception might attach never happened. The appellant also cites Acker *v.* Acker (81 N. Y. 143). The plaintiff there was under the control of a disabling statute, as a married woman, and its repeal so worked against her as to take away the extension of the time of limitation that theretofore had existed in her favor. Here the plaintiff does not ask to have her case saved from the application of the new period of limitation, but seeks its benefit. It has been properly held that she was entitled to it, and the judgment which follows that ruling should be affirmed.

All concur.

Judgment affirmed.

See George *v.* Chicago, etc., R. R. Co., 2 Am. & Eng. R. R. Cas. 646; Mobile & M. R. Co. *v.* Cranshaw, 8 Am. & Eng. R. R. Cas. 340; Tobin *v.* Houston, etc., R. Co., 8 Am. & Eng. R. Cas. 477.

TUTTLE
v.
TRAVELLERS' INSURANCE CO.

(134 *Massachusetts Reports*, 175.)

Under a policy of insurance against accident, providing that no claim shall be made under it when the death or injury may have happened in consequence of exposure to any obvious or unnecessary danger, and containing a condition that the assured is required to use all due diligence for personal safety and protection, no recovery can be had for the death of the assured, which is caused by his being struck by a railroad train, while running along the tracks in front of it in the night-time, for the purpose of getting on a train approaching in an opposite direction on a parallel track.

CONTRACT upon a policy of insurance against accident, issued by the defendant corporation upon the life of Stephen Tuttle, and made payable to the plaintiff, his wife.

At the trial in this court, before Devens, J., the evidence showed that, about ten o'clock in the evening of March 13, 1879, Tuttle was killed by being struck by a railroad train, while running along the tracks in front of it, for the purpose of getting on a train approaching in an opposite direction on a parallel track. The judge, at the defendant's request, ruled that the action could not be maintained; directed the jury to return a verdict for the defendant; and reported the case for the consideration of the full court. If the ruling was correct, judgment was to be entered on the verdict; otherwise, a new trial was to be had. The material provisions of the policy appear in the opinion.

G. A. A. Pevey for the plaintiff.

S. Lincoln for the defendant.

ALLEN, C. J.—The policy provides, among other things, that no claim shall be made under it "when the death or injury may have happened in consequence of exposure to any obvious or unnecessary danger." It is also made subject to the condition, that "the party insured is required to use all due diligence for personal safety and protection." Both of these provisions were violated by the act of the deceased in going upon and along the track of the railroad, under the circumstances stated in the report. Wright *v.* Boston & Maine R. R., 129 Mass. 440, 443. No two cases are precisely alike in their facts; and what constitutes due care must depend upon the facts of each case. But the conduct of the deceased was such as, in the words of Mr. Justice Colt, is "condemned by the general knowledge and experience of all prudent

men, and is conclusive on the question of due care." The danger was obvious, the exposure to it unnecessary, the want of due diligence clear; and the death of the insured occurred in consequence thereof. See also Wills *v.* Lynn & Boston R. R., 129 Mass. 351; Johnson *v.* Boston & Maine R. R., 125 Mass. 75; Allyn *v.* Boston & Albany R. R., 105 Mass. 77; Cordell *v.* New York Central & Hudson River R. R., 75 N. Y. 330; 70 N. Y. 119; 64 N. Y. 535; Baxter *v.* Troy & Boston R. R., 41 N. Y. 502; McCarty *v.* Delaware & Hudson Canal, 17 Hun, 74.

The plaintiff contends that it was not the exposure or negligence of the assured which caused his death, but the coming upon him of the locomotive engine, the bell or whistle of which may not have sounded; that this was a new force or power which intervened, of itself sufficient to stand as the cause of the misfortune; that it was for the jury to determine whether or not the railroad corporation was negligent; and that, if so, the negligence of the assured, if it existed, was too remote to defeat the policy. Insurance Co. *v.* Tweed, 7 Wall. 44, 52; Milwaukee & St. Paul Ry. *v.* Kellogg, 94 U. S. 469, 475; Scheffer *v.* Railroad Co. 105 U. S. 249, 252. But, without speculating as to possble cases, we do not think that the doctrine relied on is applicable to this case. If a person voluntarily places himself in a position where he is exposed to an obvious danger, and the precise injury happens to him which there is reason to fear, it cannot fairly be held that the language of this policy was not intended and understood to be applicable to such a case. For example, if one while walking on a railroad track is assaulted by a robber or a dog, or is struck by lightning, his act of travelling there has no tendency to produce the injury, and is not to be deemed a contributory cause thereof. But, on the other hand, if one who goes into a battle is hit by a bullet, or if one who goes up in a balloon is blown out to sea by the currents of the air, or if one who makes a railroad track his path for travel is run over by a passenger locomotive engine, he must ordinarily in any legal question be held to take the risk of those results. There is in each of these cases such an association of cause and effect that the one must be held to have contributed to the other. To hold that the death of the assured in the present case did not happen in consequence of his exposure to the risk, but from a new force or power which intervened, would be to fritter away the language of the policy by metaphysical distinctions to enter into the understanding or contemplation of parties engaged in the practical business of making a contract of insurance. We must assume that the assured read his policy, and was acquainted with its language and attached some practical meaning to it. See White *v.* Lang, 128 Mass. 598; McGrath *v.* Merwin, 112 Mass. 467; Norton *v.* Eastern R. R., 113 Mass. 366; McDonald *v.* Snelling, 14 Allen, 290; Cuff *v.* Mutual Benefit Insurance Co.

GRAVES, C. J.—The defendant has a main and side track which cross a common highway near the station building at the village of Grand Blanc. The travelled portion of the way at the place of crossing is planked to the width of about 32 feet. In the course of its business the company left an ordinary box freight car standing on the side track, and within the legal limits of the highway. It occupied about one half of the travelled part, leaving ample room for the easy passage of teams. The plaintiff, in going to Mr. Stone's to dinner, rode in a buggy with Mr. Lyman past this car without any inconvenience. But when he returned in a buggy with Mr. Stone, the horse, on coming to the track, suddenly started to one side, and as a consequence the plaintiff lost his balance, and either fell or was thrown in contact with the wheel, and was injured. He brought this action for the injury, and was allowed to recover.

The record raises two or three questions, but only one need be noticed. It is important to fix attention upon the exact ground of the action. As laid in the declaration, the essence of the plaintiff's case is that the horse, though one of ordinary gentleness, took fright at the car, and which was a thing well calculated and naturally would frighten horses of that character, and hence that its being left there was actionable negligence and a basis of liability to the plaintiff. We observe, then, that the act complained of is not the act of leaving a freight car standing on a part of the highway. The particular fault charged is the fault of leaving at that place a vehicle or article which would naturally frighten horses of ordinary gentleness. The mere presence of the car in a portion of the highway, and apart from its fitness or liability to produce that consequence, is not counted on as matter of grievance. The right of action was rested on the assumption that the car there standing was a thing which would naturally scare usually gentle horses. It was, therefore, a vital question whether it was really a cause of that kind of danger or not; because, if it was not dangerous in that way, there was no foundation for the action.

The defendant's counsel contended at the trial that the question was one for the court, but the learned judge overruled the point, and decided that it was a subject for the jury. We are unable to concur in this ruling. There are a vast variety of things which must be regarded as matters of common knowledge; things which every adult person of ordinary experience or intelligence must be presumed to know; things which do not require to be pleaded or to be made the subjects of specific proof; and it is not within the province of a court to leave it to a jury to find contrary to this knowledge. The question before us is subject to this principle. It is according to daily experience to see cars going or standing on the common highways while teams are variously employed near by, and pass and repass without taking fright. We have street-

cars, and steam fire-engines, and steam threshing-machines, but horses readily become familiar with them, and serious frights are exceedingly rare and entirely exceptional. As objects calculated to alarm horses, the rule is in favor of their harmlessness. If a standing freight car should be deemed as dangerous as here represented, it would be impossible to consider these machines and vehicles as fit to appear on the highway. Moreover, the reason would apply to a thousand customary and convenient modes of use of our ordinary highways, which have always been exempt from such doctrine, and which must remain exempt unless we are prepared to surrender a large and valuable portion of our rights connected with the public thoroughfares.

I think the principle is settled in Macomber *v.* Nichols, 34 Mich. 212, and that the defendant was entitled to the ruling which was refused.

The judgment must be reversed, with costs, and a new trial granted.

Campbell and Cooley, JJ., concurred.

SHERWOOD, J.—In this case, under the facts and circumstances stated in the record, I think the defendant was guilty of actionable negligence in allowing its freight cars to remain standing upon the public highway in the manner it is shown to have done at the time the injury occurred to the plaintiff; and I further think that an empty box car, or any other kind of railroad car, allowed to stand on the highway as this was permitted to, is naturally calculated to frighten horses of ordinary gentleness, not accustomed to go or be used about such cars.

The defendant did not demur to the plaintiff's declaration. It was sufficient to support the judgment given in this case after a trial upon the merits, and should not be reversed upon the grounds taken in this court on this hearing. Stofiet *v.* Marker, 34 Mich. 313; Brown *v.* McHugh, 35 Mich. 50; Aldrich *v.* Chubb, id. 350; Jackson *v.* Collins, 39 Mich. 558; Briggs *v.* Milburn, 40 Mich. 513; Rowland *v.* Kalamazoo Sup'ts of Poor, 49 Mich. 553; s. c. 14 N. W. Rep. 494.

I think the case was properly submitted to the jury, and should be affirmed, with costs.

Frightened Horses.—The subject of the liability of railroad companies for injuries occasioned by the frightening of horses will be found to be discussed in the following cases: Wasmer *v.* Delaware, L. & W. R. R. Co., 1 Am. & Eng. R. R. Cas. 122; Billman *v.* Ind., Cinn. & L. R. R. Co., 6 Am. & Eng. R. R. Cas. 41; Louisville & N. R. R. Co. *v.* Schmidt, 8 Am. & Eng. R. R. Cas. 248; Strong *v.* Placerville R. R. Co., 8 Am. & Eng. R. R. Cas. 273; Myers *v.* Richmond & D. R. Co., 8 Am. & Eng. R. R. Cas. 293; Bussian *v.* Milwaukee, etc., R. R. Co., 10 Am. & Eng. R. R. Cas. 716.

Union Pacific Ry. Co.

v.

Harwood.

(*Advance Case, Kansas. February* 7, 1884.)

Where a shipper of stock has a contract with the railway company for himself to load his stock upon the cars of the company at its stock-yards, and a car is furnished him near the chute of the yards for his use, and one of his employees uncouples it from another and pushed it down to the chute for the purpose of loading the stock, the railway company in the management of its other cars owes the duty of exercising ordinary care and diligence to the shipper and his employees while they are engaged in loading the car and doing such other work preparatory to loading as is usual and necessary to do. *Held*, also, that if the company is guilty of ordinary negligence in leaving a car unattended upon the same track with the car to be loaded by the shipper without having secured the same by brakes or otherwise to prevent it from moving, and the car is moved by a hard or strong wind against the car about to be loaded, and upon an employee of the shipper, and the employee is without fault and free from any negligence or wrongful act on his part directly contributing to the injury, the railway company is liable to him for the result of its negligence.

Error from Davis County.

J. P. Usher, A. L. Williams, and Charles Monroe for plaintiff in error.

McClure and Humphrey for defendant in error.

Horton, C. J.—This was an action brought by Frank Harwood against the Union Pacific Ry. Co., to recover damages for personal injuries alleged to have been sustained through the negligence of the railway company. The evidence conduced to show that Scott & Thurston, residing at Junction City, in this State, were engaged in the business of shipping live stock over the Union Pacific Ry. to Kansas City; that Harwood was in the employ of the firm as a clerk; that Scott & Thurston had ordered from the railway company the day prior to February 28, 1882, a car to ship hogs in; that on said February 28th, between 11 and 12 o'clock, they, with their employees, including Harwood, went to the railway stock-yards at Junction City to load the hogs in a car; that the train by which the shipment was to be made was due about 12 o'clock; that the car in which the hogs were to be loaded was not on the track when the parties got there; that the first thing Harwood did after he got down to the stock-yards was to drive the hogs from Scott & Thurston's yard into a pen of the Union Pacific stock-yards, which had a chute opening into it through which the hogs could pass or be driven up into the car in which

they were to be loaded; that he had assisted Scott & Thurston to load hogs and other stock at these yards for the last four or five years; that an engine hauled two cars past the chute and left them in the presence of Harwood, the nearest one being about thirty feet north of the chute; that the engine was then uncoupled and pulled up to the switch on to the main track; that the two cars hauled by the engine were left coupled together; that the yard-master, whose duty it was to station cars, directed these two cars to be left north of the chute; that the yard-master pointed out to Scott, of the firm of Scott & Thurston, the car nearest the chute as the one he was to use; that there were three or four boards cut out at each end of the car pointed out; that Scott went after the car inspector to come and repair it; that about the same time his employees, either Freeman or Harwood, uncoupled the two cars and moved the car to be loaded by Scott & Thurston by hand down to the chute; that the brakes were not set, nor the wheels blocked, of the other car left standing, fifty or eighty feet north of the chute; that the car inspector, with another man, one Morganfeldt, came down and went inside of the car to fix it; that they closed up the hole in the south end of the car and were going towards the north end; that at this time the wind was blowing quite hard, and it was slight down grade to the chute from the place where the car was left standing and unattended on the north; that Harwood was climbing up the chute to get in with the hogs so as to load them into the car; that one of the hogs got into the car from the chute about this time, and he changed his mind about climbing up and passed around to the north end of the car to prevent the escape of the hog through the opening in the car; that his face was to the south; that while thus employed the car left standing north on the track, moved by the wind, came down the track, collided with the car at the chute, and caught Harwood between the draw-heads, inflicting upon him severe and painful injuries; that Harwood had no knowledge the brakes were not applied to the car left standing and unattended north of the chute; that Scott asked the yard-master to place the car for him to load his hogs in the chute, but it was hauled north past the place and stopped at the yard-master's signal; that when the company did not place cars at the chute by the engine, to be loaded, the shippers were in the habit of placing them there; that the company furnished the cars to Scott & Thurston, and the latter always loaded them.

The railway company claims the petition did not state a cause of action; that the court erred in overruling the demurrer to the evidence introduced to the plaintiff below, and further erred in overruling the motion of the railway company for judgment upon the special findings. The principal question presented is whether, under the allegations of the petition and the evidence introduced upon the

trial, Harwood was lawfully upon the track of the railway company at the time he was injured, and, therefore, whether the railway company owed to him any duty. If he had no legal right to be upon the track, or if he was a volunteer there, then, of course, the law imposed no duty upon the railway company except the general duty which every man owes to others—to do them no intentional wrong or injury. Under the contract between the railway company and Scott & Thurston the latter was to load the hogs in the car. Scott requested the yard-master to place the car for him at the chute so that he could load his stock in it. Instead of being placed at the chute it was hauled, coupled with another, some distance north of it, and then the yard-master pointed out to Scott this car as the one he was to use. After the yard-master pointed out to Scott the car for him to load in, he seemingly relinquished all further care of and control over it. After this car had been hauled north of the chute, and the engine hauling it had pulled up to the switch on the main track, Scott & Thurston had no easy or convenient way to place the car at the chute of the stock-yards other than by having their employees push it down by hand. Their employees, including Harwood, were not, therefore, trespassers or volunteers in uncoupling the car and pushing it down to the chute. They were acting for Scott & Thurston, and were lawfully upon the track in charge of one of the cars of the company with the consent of the railway company. Therefore, to them the railway company, in the management of its cars, owed the duty of exercising ordinary care and diligence. It was the duty of the company to take all necessary and reasonable precautions to render Scott & Thurston and their employees safe while engaged in the performance of the work about the car turned over to them for shipping the hogs; and while Harwood and the other employees of Scott & Thurston were on the track near the stock-yards attending to the business of Scott & Thurston about the loading of the hogs in the car set apart for their use, or doing other work preparatory to loading, as was usual and necessary to do, the railway company had no right to endanger their persons or lives by the want of ordinary care in the handling and management of its other cars. If the railway company was guilty of ordinary negligence in leaving a car unattended upon the same track with the car to be loaded by Scott & Thurston, without having secured the same by brakes or otherwise, to prevent it from moving upon the track, and the car was moved by the high wind then prevailing, against Harwood, and the latter was without fault himself, and free from any negligence or wrongful act on his part, directly contributing to the injury, the railway company must be held liable for the injury resulting to him from its negligence. Stinson *v.* Railroad Co., 32 N. Y. 333; Haley *v.* Railroad Co., 7 Hun, 84; Crown *v.* Railroad Co., 8 Rob. (La.) 45;

Newson *v.* Railroad Co., 29 N. Y. 383. See, also, Nicholson *v.* Railroad Co., 41 N. Y. 526. Within the law thus stated the petition was not fatally defective. As there was evidence of actionable negligence on the part of the company, the case was not, therefore, one to be taken from the jury. The question whether there was contributory negligence on the part of Harwood was for the determination of the jury, under proper instructions, as a matter of fact. The jury found against the railway company. The findings of the jury are not, we think, inconsistent with the general verdict, and the motion of the company for judgment upon the findings was properly overruled.

Complaint is made concerning certain testimony admitted, tending to show the custom in respect to shippers handling the cars in the stock-yards at Junction City. The contract under which Scott & Thurston shipped their hogs on February 28, 1882, required them to load the stock; and as the yard-master of the company pointed out, and turned over to them, the car afterwards pushed down to the chute for their use, the evidence under the circumstances could not have been prejudicial, because it is apparent that the yard-master expected Scott & Thurston to use the identical car they did use for the shipment of their hogs, and, to load it with the hogs, it was necessary to be placed at the chute. It was taken north of the chute and stopped, and then turned over for their use. Had Scott & Thurston, or their employee, Harwood, without the consent of the company, taken the car, or if the yard-master had informed Scott & Thurston, or their employees, that the car was not to be uncoupled or moved until repaired, a different question would be presented for our consideration. Further, the evidence tending to show the company furnished the cars, and the shippers loaded them, and that when the company left the cars a short distance from the chute, the shippers placed them at the chute, did not vary or modify the written contract in evidence; at most, this evidence merely showed the manner of transacting business where the shippers were to load the stock.

The instructions are also greatly criticized; but, after a careful examination of all the objections made to them, we do not perceive any error sufficient to authorize us to grant a new trial. The railway company asked that the jury should be instructed not to compare the negligence or supposed negligence of the parties. This instruction might very properly have been given; but, as the court carefully and fully directed the jury upon all the issues, the omission of this instruction is not sufficient to overturn the judgment. Many rulings of the trial court were commented upon in the case of Railway Co. *v.* Peavey, 29 Kan. 169, but we did not decide in that case that every error referred to was of itself sufficiently material and substantial to cause a reversal of that judgment.

The decision of the court below against the removal of the case

to the federal court must be sustained, under the authority of Railway Co. *v.* Dyche, 1 Pac. Rep. 243.

The judgment of the district court will be affirmed.

All the justices concurring.

BROWNELL
v.
TROY & BOSTON R. R. CO.

(55 *Vermont Reports*, 218.)

The defendant railroad is liable for injuries sustained by the plaintiff while travelling on a highway, which injuries were caused by its leaving obstructions on the margin of the highway, though it had never been surveyed, but had been used by the travelling public more than twenty years. A highway by dedication may have a margin.

If it is claimed that there was no evidence to support the finding of the jury, the question should be presented in the County Court and before judgment on the verdict.

On cross-examination one of the plaintiff's witnesses testified that he with another man, at the request of the defendant's wood-agent, went to see the plaintiff, to ascertain what he would settle his claim for, and reported his terms to said agent. The agent was then called and denied the conversation, and also said that he had no authority to request any one to see the plaintiff; and, on cross-examination, that he did not assume such authority. The plaintiff was then allowed to show that at said interview the wood-agent gave them to understand that he represented the defendant. *Held*, no error.

ACTION for injuries caused by the defendant's having obstructed a highway. Plea, general issue. Tried by jury, June Term, 1881, Bennington County, TAFT, J., presiding. Verdict for the plaintiff.

The plaintiff's testimony tended to prove that at a certain point in the town of Pownal, about a mile south of the village of South Pownal, said highway passes on a curve around the foot of a hill containing a deposit of gravel, and said railroad passes on a like curve around the foot of the same hill, outside of the highway; that said railroad was laid out and constructed at this point directly upon the highway as theretofore used, and the latter was thereby crowded easterly into the narrow space between said railroad and said hill, and, as the same was used by the public from the time of the construction of said railroad down to and at the time the plaintiff received the injury complained of, said highway at said point ran for a distance of about forty rods close beside said railroad and between the railroad fence and the foot of said hill; that in the spring of 1876 the defendant constructed a spur

or side track leading from its railroad across said highway, near the north end of said forty-rod strip, and extending thence southerly around the foot of said hill between said highway and said gravel bank, and commenced to load said gravel upon its cars upon said side track and haul the same away; that in the course of so doing, and while defendant was carrying on said work with its own employees, a large amount of débris consisting of stones and masses of concrete too large to be loaded and used, and of stumps and roots of trees standing and growing upon said side hill were moved across said side track and deposited along the side of said travelled highway, thereby crowding said travelled highway closer to said main railroad track than before, and narrowing the space available for the passage of teams therein; and that among the débris so deposited was a large root which caused the overturning of plaintiff's wagon, as hereafter stated.

The plaintiff's testimony further tended to show that at the time he received his injury a large amount of gravel had been removed from said gravel bank, and there were then two side or spur tracks extending into said gravel pit, and that on such side track nearest the highway were standing twenty-eight gravel cars, platform cars, and coal cars, the one nearest the crossing of the highway over said side track being a coal car belonging to the defendant and placed there by the defendant, the end of which was only ten feet from the centre of the travelled path of the highway, and at a point in said highway, where the plaintiff's evidence tended to show that the same had been used as a public highway for more than sixty years, which car was considerably within the limits of said original highway. Plaintiff's evidence further tended to show that on the fifteenth day of April, 1878, he was driving with his horse and wagon along said highway, and as he approached said forty-rod strip of road, knowing that a regular train from the west was about due, and being acquainted with the condition of said highway and its proximity to the railroad, stopped his horse and listened; that he neither saw nor heard any approaching train, and, believing that the cars were not coming, started to drive through said forty-rod strip; that as he was passing over it and when he had reached a point some eight or ten rods short of the position of said coal-car, he heard a train coming rapidly from the west which immediately came in sight around the curve very near him, and almost directly in front of his horse; that the horse was frightened and the plaintiff was unable to control him; and that he swerved from the travelled path of said highway to the right, running directly towards said coal car standing across the same, where he wheeled around to the right and ran back along the easterly side of said forty-rod strip and of the travelled track of the highway therein until the wheels of the wagon struck the said root with such force that the wagon was

overturned with great violence, the plaintiff thrown out towards the railroad fence and severely injured and the wagon broken; that but for the position of said car as aforesaid, his horse would not have turned round, but would have continued along the side of the highway in safety; and that said root lay within a few feet of the travelled path of said highway and about fifteen rods southerly from said car, a large amount of said other débris being scattered in the same vicinity and along the side of said highway southerly from said root.

Defendant's testimony tended to show that plaintiff's horse and wagon did not get out of the travelled track of the highway at all, but that the horse being frightened by the approaching train suddenly turned round in the travelled track and tipped the wagon over and threw plaintiff out, and that neither the root, débris nor cars contributed at all to the injury of the plaintiff.

The court charged as to the defendant's request mentioned in the opinion as follows:

"A question has been made with reference to the highway,—the existence of it as a legal highway, whether it is such a one that plaintiff would have a right to recover on account of these nuisances or obstructions being placed in it. There is no testimony in the case of the original survey of the road, or where the limits of it are; and there is no testimony, if I understand it correctly, as to where the lines of the railroad are. . . . . I think the fact that there has been no survey of it and no testimony of it with reference to where the lines of the highway are, in that respect, is no bar to the recovery of the plaintiff, provided you find that there was a public highway travelled by the public, used by the public, and that these obstacles were upon the highway that was so used by the public at that time. If you find these facts with reference to it, it is no bar to recovery that there is no recorded survey, or that the plaintiff has not shown to you the exact location of the boundaries or lines."

The other facts are sufficiently stated in the opinion of the court.

H. A. Harman, J. K. Batchelder, and T. Sibley for defendant.

When a highway is gained, not by survey and paying damages, but by gradual encroachment, does the legal highway extend beyond the limits of actual use? Is there, beyond this, a space not wrought for travel but still within the legal highway limits, which the land-owner is bound to keep free from obstruction, as he is not bound to keep the rest of his land?

This mooted question was sharply defined by the defendant's request to charge. The court was asked to rule that such highways have no margins; but this request was refused, and instead, the jury were merely told that if there was a highway and these obstacles were upon it, the plaintiff need not show where the lines

of that highway were, thus leaving to the jury to decide that pure question of law which the defendant has brought here for revision. It is error to leave law questions to the jury. Collamer *v.* Langdon, 29 Vt. 32; Driggs *v.* Burton, 33 Vt. 124; 32 Vt. 607.

Robinson's statements inadmissible. Story Agency, ss. 134–5; 1 Greenl. Ev. ss. 113, 449; 2 Ib. 53; Brigham *v.* Peters, 1 Gray, 139.

Prout & Walker for plaintiff.

The right of action is complete both at common law and by statute. Abbott *v.* Mills, 3 Vt. 521; R. L. ss. 3131, 3132, 3133.

The court cannot exclude "margins" in such a case as matter of law. An obstruction adjacent to a travelled road or path, dangerous in case of sudden casualty, is a nuisance. Beck *v.* Carter, 68 N. Y. 283.

In the present case there was evidence that the result of the depositing the débris, including the root in question, was the "crowding said travelled highway closer to said main railroad track than before, and narrowing the space available for the passage of teams therein." The jury might well find, as the fact was, that plaintiff was overturned upon what had been travelled road for twenty years prior to the working of this gravel-pit. The request overlooked this evidence altogether.

Even without this proof, however, the request was wholly incorrect. Wood on Nuisances, ss. 240–290; State *v.* Wilkinson, 2 Vt. 480; State *v.* Atkinson, 24 Vt. 448–459; Prouty *v.* Bell, 44 Vt. 72; Bagley *v.* Ludlow, 41 Vt. 425; Coates *v.* Canaan, 51 Vt. 131.

Royce, Ch. J.—When the accident for which he claims to recover happened to the plaintiff, he was travelling upon a public highway in the town of Pownal. When the defendant constructed its railroad in said town, in 1857, it occupied for its roadbed what had been a public highway for more than sixty years, and it was thereby crowded easterly; and the highway that was thus crowded easterly was the one upon which the plaintiff was travelling at the time of his injury. There was no evidence that said highway had ever been laid out, but it did appear that it had been used as a public highway since 1857. The defendant company became the owner of the land contiguous to this highway in 1876, and while occupying it the plaintiff's evidence tended to show that it placed the obstructions upon and so near to it that it was rendered unsafe, and that such obstructions were the proximate cause of the injury he sustained.

The defendant in the court below requested the court to charge that to entitle the plaintiff to recover he must prove that the obstructions complained of were within the surveyed limits of the highway; that where land has been dedicated for a highway the

right of the travelling public to use it for travel is confined to the actual track made by such travelling public, and no margin exists. While that may be true as defining and limiting the right of user, and that as between the adjoining land owners and a traveller no margin exists that the traveller has the right to enter upon or use, it does not follow that such land owners have the right to so use such margins as to endanger the safety of a traveller while he is travelling in the track which the public have the right to travel upon.

The court complied with the request as far as the defendant was entitled to have it complied with, and in its charge upon the subject of the request to which exception was taken, we find no error. The court further charged that to entitle the plaintiff to recover it must be found that the obstructions complained of were upon the highway that was used by the public at that time, and the jury must have so found. It is claimed in argument that there was no evidence to support such a finding; that question should have been presented in the County Court and before judgment on the verdict. This court cannot assume that there was no such evidence.

In the cross-examination of one of the selectmen of Pownal, who was a witness called by the plaintiff, he testified that he, with another of the selectmen, by request of one Robinson, who was the wood-agent of the defendant, went to see the plaintiff and ascertain what he would settle the claim that is in question in this suit for, and obtained his terms and reported them to Robinson. Robinson's agency and connection with the subject-matter in controversy were thus brought into the case by the defendant. Robinson was then called as a witness by the defendant, and denied having any such conversation as the selectman had testified to, and said he had no authority to request any one to go and see the plaintiff; and, on cross-examination, that he did not assume any such authority. The plaintiff was then allowed, against the objection and exception of the defendant, to show that at said interview Robinson gave them to understand that he represented the defendant. What transpired at that interview was only material as tending to show an acknowledgment of liability, and to be prejudicial to the defendant it should have been shown that Robinson had authority to act for the defendant. No such authority could be presumed from the fact that he was the defendant's wood-agent, and no other authority or agency seems to have been shown. The presumption is that the court gave the jury proper directions as to the use to be made of the evidence concerning what had transpired at that interview, as they might have found it to have been, and with such instructions it is not easy to see how the defendant could have been prejudiced if they did not find it as the plaintiff's evidence tended to show.

There was a question of veracity between the plaintiff's witnesses and Robinson. Robinson denied having made any such proposition as the plaintiff's witnesses had testified to, and, as confirmatory of his denial, denied having authority to make it, or that he assumed to have authority. It would be more probable that he did make the proposition if he assumed that he had the right to make it than it would be if he made no such assumption, and as affecting the veracity of the witnesses who had testified concerning it the testimony was admissible.

The judgment is affirmed.

HYDE, Adm'r,

v.

WABASH, ST. L. & P. RY. CO.

(*Advance Case, Iowa. June* 16, 1883.)

In the absence of the statute no action can be maintained for an injury resulting in death, and a recovery therefor can only be had in accordance with the law of the place where the injury occurred.

APPEAL from Mills Circuit Court.

Action for a personal injury. The plaintiff alleges in his petition, in substance, that he is the administrator of the estate of J. W. Hyde, deceased; that the defendant is engaged in the business of a common carrier, and as such is running its trains from Malvern, Mills county, Iowa, to some point in the State of Missouri; that in November, 1879, the defendant received from one Weazen certain live-stock at its station at Malvern for transportation; that the plaintiff's intestate was engaged in aiding said Weazen in the transportation of said stock, and in taking the proper care and management thereof; that the defendant, in consideration of the benefits to be derived from the contract entered into between it and Weazen for the transportation of the stock, authorized the plaintiff's intestate to take passage on the same train on which the stock was being conveyed; that the defendant so carelessly ran its said train while crossing a bridge over the Missouri river at St. Charles, Missouri, that a portion of the train was thrown from the track, and the plaintiff's intestate was instantly killed. To the petition so averring, in substance, the defendant demurred upon the ground that "the petition shows that the death of said J. W. Hyde occurred in the State of Missouri, and fails to show that

under the laws of Missouri the plaintiff is entitled to maintain an action on account of said death." The court sustained the demurrer, and, the plaintiff electing to stand upon his petition, the court entered judgment against him for costs, and he now appeals.

J. H. Keatley and Hale, Stone & Proudfit for appellant.

H. H. Trimble & Son and D. H. Solomon for appellee.

ADAMS, J.—At common law no action can be maintained for an injury resulting in death. Baker *v.* Bolton, 1 Camp. 493; Carey *v.* Berkshire R. R. Co., 1 Cush. 475; Palfrey *v.* Portland, Saco & Portsmouth R. Co., 4 Allen, 55. The injury in this case resulting in death, no action can be maintained for it unless by reason of a statute. So far, we presume, there is no controversy. The plaintiff does not aver that there is any statute of Missouri giving him a right of action, and we presume that he does not rely upon such statute. He shows, indeed, by his argument that he relies upon a statute of Iowa. The question presented, then, is as to whether the action can be maintained under the statute of Iowa. The statute which we understand the plaintiff to rely upon is section 2525 of the Code, and is in these words: "All causes of action shall survive and may be brought, notwithstanding the death of the person entitled to or liable for the same." The plaintiff contends that the question as to whether an action survives pertains to the remedy, and must be governed by the law of the place of the court. He contends, therefore, that it is immaterial where the action arose; that wherever it arose the words of the statute are broad enough to cover it; and that if the court had construed them according to their plain import it would have been so held. But, in our opinion, there is a question involved deeper than one pertaining merely to the remedy. Where a cause of action does not survive, it is to be treated the same as if it never arose. The cause of action in this case arose, if anywhere, in Missouri; but if it did not survive in Missouri, and if the courts of that State would treat it as if it never arose, we think it would be improper for the courts of this State to treat it as if it did. An act which, done in Missouri, does not create a liability in that State, would not create a liability anywhere.

Again, if the cause of action survives, it must survive to some person or persons. A cause of action which survives only by statute, must survive to the person or persons designated by statute. Now, suppose that by a statute of Missouri the cause of action in this case (as we understand the fact to be) survives to the intestate's wife—if he left one—and, if not, to his minor child or children, or father and mother, as the case may be. If such is the fact, it could not properly be held to have survived under the statute of Iowa to the personal representative. The company should not be subjected to more than one liability for the same act; yet

it is difficult to see how a recovery in Iowa would, under the supposition made, bar a recovery in Missouri. In some States the measure of liability is fixed; in others it is limited; in others still, as in this State, it is unlimited. This consideration alone would be a strong reason for allowing a recovery only in accordance with the law of the place of the injury. It is unnecessary to elaborate. That a right of recovery for such injury exists only by reason of the law of the place of the injury, has been held in Whitford *v.* Panama R. Co., 23 N. Y. 465; State *v.* Pittsburgh & C. R. Co., 45 Md. 41; Hover *v.* Pennsylvania R. Co., 25 Ohio St. 667. See, also, Story, Confl. Laws, § 307. And even where a right of recovery is given by a statute of the State where the injury occurred, it has been held that no courts, except those of such State, can enforce the law. Richardson *v.* N. Y. Cent. R. Co., 98 Mass. 85; Woodward *v.* M. S. & N. Ind. R. Co., 10 Ohio St. 121.

The plaintiff contends, however, that if it should be conceded that the rules above expressed are applicable to an action based wholly upon tort, they are not applicable to this. He contends that his intestate had a contract with the company; that the contract—implied from the circumstances under which he took passage—was to carry him safely; and that, such contract not having been performed, a right of action accrued to his intestate at common law, which can be enforced anywhere. It is not to be denied, we think, that the petition shows that the intestate had, at the time he took passage, a contract with the defendant to carry him safely. Whether, if the petition showed such contract subsisting at the time of the injury, it would show a right of recovery, we need not determine. It does not show such contract subsisting.

It is not averred for what place the intestate took passage, nor even what the destination of the stock was. It is true, the petition contains an averment that the intestate, when injured, was in a car where he had a right to be; but this is a mere conclusion.

In our opinion the demurrer was properly sustained.

Affirmed.

No Action Lies to Recover Damages for Death Independent of Statute.—At common law it is well settled that damages are not recoverable for causing the death of a human being. Higgins *v.* Butcher, Yelv. 89; Baker *v.* Bolton, 1 Camp. 493; Cross *v.* Guthery, 2 Root, 90; Carey *v.* Berkshire R. Co., Cush. 475; Skinner *v.* Housatonic R. Co., 1 Cush. 475; Kearney *v.* Boston, etc., R. Co., 9 Cush. 108; Connecticut Ins. Co. *v.* N. Y., etc., R. Co., 25 Conn. 265; Richardson *v.* New York, etc., R. R. Co., 98 Mass. 85; Needham *v.* Grand Trunk R. Co., 38 Vt. 294; State *v.* Grand Trunk R. Co., 58 Mo. 176; Whitford *v.* Panama R. Co., 23 N. Y. 465; Penna. R. Co. *v.* Adams, 55 Pa. St. 499; Western, etc., R. Co. *v.* Strong, 52 Ga. 461, Woodward *v.* Michigan, etc., R. Co., 10 Ohio St. 121; Insurance Co. *v.* Brame, 95 U. S. 754;

Georgia R. Co. v. Wynn, 42 Ga. 331. But see contra, Sullivan v. Union Pac. R. Co., 3 Dill. 324; Holmes v. Oregon, etc., R. R. Co., 5 Fed. Rep. 75.

Remedy for Death is Local.—The right of action for causing death is governed by the law of the place where the death is occasioned. Whitford v. Panama R. R. Co., 23 N. Y. 465; Beach v. Bay State, etc., 30 Barb. 433; Nashville, etc., R. Co. v. Eakin, 6 Coldw. 582; Hover v. Penna. Co., 25 Ohio St. 667; Mahler v. Norwich, etc., Transportation Co., 35 N. Y. 352.

Where suit is brought in another jurisdiction the laws of that jurisdiction in regard to the matter can not therefore be invoked, even though the corporation inflicting the injury causing death is chartered by the State where suit is brought. Whitford v. Panama R. Co., 23 N. Y. 465; Crowley v. Panama R. Co., 30 Barb. 99; State v. Pittsburgh, etc., R. R. Co., 45 Md. 41. But see Berry v. Montgomery, etc., R. Co., 39 Ga. 554. And it makes no difference in this respect that the person injured was afterwards brought into the State where suit is brought and there died. Needham v. Grand Trunk R. R. Co., 38 Vt. 294.

In Illinois it is held that the right of action given by statute against corporations is purely local in the State creating such corporations. Illinois Central R. Co. v. Cragin, 71 Ill. 177; Baltimore, etc., R. Co. v. Wightman's Admr. 29 Gratt. 431.

Right of Action in another State.—The right of action for negligently causing death conferred by the statute of one State may be enforced in the courts of another, provided that the maintenance of such a suit is not contrary to the public policy of the State, and that this appears from the existence therein of similar statutes. Selma, etc., R. Co. v. Lacey, 43 Ga. 461; Western, etc., R. Co. v. Strong, 52 Ga. 461; Staelknecht v. Penna. R. Co., 53 How. Pr. 305; Dennick v. C. R. R. of N. J. 1 Am. & Eng. R. R. Cas. 309. Chicago, etc., R. Co. v. Doyle, 8 Am. & Eng. R. R. Cas. 171; Patton v. Pittsburgh, etc., R. R. Co., 11 Am. & Eng. R. R. Cas. 658. See contra, McCarthy v. Chicago, etc., R. Co., 18 Kans. 46.

But where the suit is not in conformity with the laws or practice of such State, it does not lie. Richardson v. New York, etc., R. Co., 98 Mass. 85; Woodward v. Michigan, etc., R. Co., 10 Ohio St. 121.

Administration.—Suit can be brought by an administrator to recover damages for causing death in another State than that where the injury occurred, without letters of administration being issued to him in such State. Jeffersonville, etc., R. Co. v. Hendricks, 41 Ind. 49; Kansas, etc., R. Co. v. Cutter, 16 Kans. 568; Taylor's Admr. v. Penna. Co., 7 Am. & Eng. R. R. Cas. 23; Wabash, etc., R. R. Co. v. Shacklett, 12 Am. & Eng. R. R. Cas. 166. But see Commonwealth v. Sanford, 12 Gray, 174.

Where the death of a person has been caused within the limits of a State, his administrator may take out auxiliary letters there to enable him to recover damages, though the decedent has no property in the State. Hartford, etc., R. Co. v. Andrews, 36 Conn. 213. But see contra, Perry v. St. Joseph & W. R. Co., 11 Am. & Eng. R. R. Cas. 663.

GIBSON

v.

MIDLAND RY. CO.

(2 *Ontario Reports*, 658.)

The plaintiff, as administratrix, sued the defendants, under 44 Vic. ch. 22, sec. 7, O., for the death of her illegitimate son, a brakesman on the defendants' railway, who was killed by being carried against a bridge not of the height required by that Act, while on one of their trains passing underneath it. The bridge belonged to another railway company, which had the right to cross the defendants' line in that way, and though the time allowed by the statute for raising the bridge had expired, they had not done so. The jury found that the defendants had been guilty of negligence in not raising, or procuring to be raised, the bridge.

***Held*, that the plaintiff was not entitled to recover (1), because section 7 of the Act applies only to bridges within the control of the company whose servant has been injured, and (2) the Act was intended to give no greater right to recover than Lord Campbell's Act, and therefore the plaintiff's relationship to the deceased prevented her recovery.**

THE plaintiff sued as administratrix for damages arising from the death of her son Ralph, a brakesman employed on defendants' road.

The case was tried at the last Spring Assizes at Belleville, before Armour, J., and a jury.

It appeared that the defendants' train was passing under a bridge in the town of Peterborough, by which another railroad, the Cobourg, Peterborough, and Marmora Co., crossed the defendants' line. This bridge belonged to the Cobourg, Peterborough, and Marmora road, and was built over defendant's line under charter. The bridge when erected was a lawful bridge. It was not the height now required by law over defendants' roadway, and it was sought to make defendants liable therefor.

On the 28th September, 1881, defendants wrote to the Cobourg, Peterborough, and Marmora Ry. Co., asking permission to pull down their bridge as being of an illegal height, etc., and on the 27th October, 1881, the latter company answered: "Regarding the bridge, if the stringers in any way interfere with the Midland Railway trains they might be lifted a little. We cannot allow the bridge to be destroyed until we are prepared to replace it."

It was proved that none of the beams or structures could have been cut or removed to get the required clear headway without rendering the bridge unsafe.

The learned Judge, expressing strong doubts as to the plaintiff's right to recover, left the following questions to the jury :—

1. Were the defendants guilty of negligence in not raising, or procuring to be raised, the bridge? Answer—Yes.

2. Was deceased guilty of contributory negligence? Answer—No.

3. What damages is the plaintiff entitled to recover? Answer—$909.

These questions were put to save the expense of a new trial if the plaintiff was held entitled to recover.

May 30, 1883. Bethune, Q. C., moved to set aside the verdict on the law and evidence. He also filed affidavits setting out that since the trial the defendants discovered for the first time that the person killed was the illegitimate son of the plaintiff.

The affidavits were very clear on this point, and no attempt was made to answer them.

Before making this motion the defendants served the plaintiff with an order to attend to be examined, but she did not attend.

Bethune, Q. C., in support of the motion, contended first, that the Act of 1881, 44 Vic. ch. 22, O., sec. 4, did not apply, as the bridge which caused the injury was not owned or controlled by defendants; and secondly, that as the deceased was the illegitimate son of the plaintiff the case did not fall within Lord Campbell's Act.

Clute, contra, argued that sec. 4 of the Act of 1881, must be read with sec. 7 of the same Act, and that the remedy therein given covered a case of this kind; and as to the second point, the Court should not now grant a new trial to let in evidence of the illegitimacy of the deceased.

Hagatty, C. J.—This action is brought under the Ontario Act of 1881, (passed 4th March, 1881) 44 Vic. ch. 22.

Section 4 directs that "every highway or other overhead bridge . . . over any railway existing at the time of the passing of this Act of which the lower beams are not of sufficient height from the surface of the rails to admit of an open and clear headway of at least seven feet . . . shall, within twelve months from that date, be re-constructed to that effect with suitable approaches thereto if a bridge, by and at the cost of the railway company, municipality or other owner thereof, and shall at all times thereafter be maintained at such height; and every such railway company before using higher freight cars than those running on their railway at the passing of this Act, or of the reconstruction as aforesaid of any such bridge . . . as the case may be, shall, after having first obtained the consent of the municipality or of the owners of such bridge . . . raise every such bridge . . . over their railway and the approaches thereto, if necessary, at the cost and charges of the railway

company so as to admit as aforesaid an open and clear headway of not less than seven feet over the top of the highest freight car then about to be used on the railway."

Section 7 gives an action to any railway servant or his representatives, if death ensue, in several cases (1) "By reason of the lower beams . . . of any highway or other overhead bridge or any other erection or structure over said railway not being at all times after the lapse of twelve months from the passing of this Act of a sufficient height from the surface of the rails to admit of an open and clear headway of seven feet . . . between the top of the highest freight cars then running on such railway and the bottom of such lower beams or members."

The right of action appears to rest on this 4th section.

It seems to be divided into two distinct cases :—

1st. That every overhead bridge, etc., existing at the passing of the Act, shall, within twelve months, be, if not allowing the prescribed headway, reconstructed, giving such headway, "by and at the cost of the railway company, municipality, or other owner thereof." This seems clearly to render it imperative on the bridge owner to make the change prescribed by the law.

2d. If such railway company use higher freight cars than those in use at the passing of the act, or of the reconstruction, that such company, having first obtained the consent of the bridge owners, shall at their own cost make the necessary alterations to conform to the act.

The case before us must turn on the first branch of the section. No case was suggested as to using higher freight cars; therefore the duty is cast on the actual owners of the bridge, and these defendants are not liable.

After they had laid their track another railway is allowed to carry its track over their line.

With the enacting clause framed as stated I cannot believe that the general words used in the 7th section can apply except to bridges within the control of the company whose servant is injured.

Then it was argued that these defendants were guilty of negligence in not procuring or compelling the other company, who owned the offending bridge, to make it conform to the statute.

I do not see how this could have been done. The act is silent on that subject. A correspondence was in evidence showing that the defendants did apply to the bridge-owning company on the subject.

On the point of illegitimacy, I do not consider that in the case of death our legislature intended to confer any larger right to recover than was provided by what is generally called Lord Camp-

bell's Act, and that the mother of an illegitimate child cannot recover damages for its death.

The case of Dickinson v. Northeastern Ry. Co., 2 H. & C. 735, is expressly in point.

Besides, therefore, the difficulty under our Railway Act, we think the action must fail on the last ground, and must be dismissed.

Armour and Cameron, JJ., concurred.

Judgment accordingly.

Illegitimate Children.—Where a statute gives a right of action to a parent for the death of a "child," the latter term is held not to extend to illegitimate children. Dickinson v. N. E. R. Co., 2 H. & C. 735; Blake v. Midland R. Co., 10 Eng. L. & Eq. 437.

But the term "next of kin" includes an illegitimate child. Muhe's Admr. v. Southern, etc., R. Co., 10 Ohio St. 272. See also Pittsburgh, etc., R. R. Co. v. Vining's Admr., 27 Ind. 513.

CHICAGO, ST. LOUIS AND N. O. R. CO.

v.

POUND'S ADM'R.

(11 *Lea's Reports, Tennessee*, 127.)

In an action by the administrator of a decedent to recover damages for causing his death under the provisions of sec. 2291 et seq. of the code of Tenn., the loss or injury to the children or next of kin occasioned by the death does not constitute an element of damage.

The act of the Legislature of Tennessee of March 26, 1883, which provides that section 2291 et seq. of the code be so amended that damages resulting to parties for whose use and benefit the right of action survives, from the death consequent upon the injuries received, shall be recoverable in such action, does not apply to suits where the cause of action arose prior to the passage of the act. The act constitutes a new or additional cause of action. The rights of the parties were fixed under the law as it existed at the time of the injury, and the law which undertook to change those rights would be retrospective and void.

APPEAL in error from the law court at Humboldt. J. T. Carthell, J.

Hill and Williamson, A. W. Campbell and Jas. Fentress for railroad.

J. S. Cooper and T. J. Hays for Pounds.

COOKE, Sp. J.—J. H. Pounds, the intestate of the defendant in error, was run over by a locomotive and train of cars of the plaintiff in error on its road and killed, and this action was instituted by his

administrator for the benefit of the children of the deceased. There was a verdict and judgment in favor of the plaintiff below. A new trial was refused, and the defendant appealed.

It is insisted here that there was no evidence to support the verdict, or at least the preponderance of testimony is so great against it as to shock the conscience of the court, and therefore a new trial should be granted.

We do not concur in this. There was an apparent conflict in the testimony, but the jury were the exclusive judges of the credibility of the witnesses and the weight to be given to the testimony. There was evidence upon which the verdict can rest, and we will not disturb it for this reason.

The charge of the court has been criticised, but there is only one objection which we deem it necessary to notice.

The deceased was a widower, with a family of several children. There was testimony tending to show that he was kind to them and provided well for them. In charging the jury upon the measure of damages his Honor instructed them as follows: "Actual damages consist of the mental and bodily sufferings of the deceased, his loss of time, and necessary expenses immediately resulting to the deceased from the personal injuries, and also the pecuniary loss his death has caused his children, if any," etc.

In all other respects we think the charge is correct, and the question is, does the above instruction contain reversible error?

The action is predicated upon sec. 2291 and following sections of the code. These sections have been several times construed by this court, but the decisions have not been uniform. The later and better construction is, that the actions given by these sections for the benefit of the widow and next of kin of a person whose death has been caused by the wrongful act, etc., of another, being the same action that accrued to, and could have been prosecuted by him in the event death had not ensued from the injury, no other element of damages can enter into or constitute a part of the recovery than such as were sustained by the deceased himself, and for which he could have recovered had he lived and prosecuted the action. And hence loss or injuries to the children or next of kin occasioned by his death can constitute no part of the cause of action or element of the plaintiff's right of recovery. See Trafford *v.* Adams Express Co., 8 Lea, 96, where the cases are carefully reviewed and the principle here stated enunciated. And this decision has been steadily followed since it was announced. N., C. & St. L. R. R. Co. *v.* Smith, 9 Lea, 470, and several unreported cases during the last term at Nashville. While a number of previous decisions had given apparent sanction to the rule announced by his honor in the above instruction, and while upon the principle of stare decisis, it might have been better not to have disturbed these former decisions, yet there can be no doubt but the present con-

struction is the correct one; and the principle upon which it is based had been announced long before in the case of Fowlkes Adams v. N. & D. R. R. Co., 9 Hum. 829.

Our attention has been called to a recent act of the legislature, passed March 26, 1883, which provides that these sections be so amended that damages resulting to the parties for whose use and benefit the right of action survives, from the death consequent upon the injuries received, shall be recoverable in such action, and which is the same provision in substance as was embraced in the former decisions referred to. And it is now insisted that inasmuch as the legislative will has thus been expressed in regard to the principle we should give to this act, a sort of persuasive force as to the proper construction to be placed upon the sections of the code above referred to, and again return to the previous construction by conforming our decisions to this recent act, or else give it a retroactive force by applying its provisions as well to cases that existed prior to its passage as those that occur under it. That this cannot be done is, we think, too plain for argument.

By art. 1, sec. 20, of the Constitution of this State, "no retrospective law, or law impairing the obligation of contracts shall be made."

By the law governing the rights of the parties at the time the cause of action alleged in this case accrued, the loss or injury to his children by the death of the deceased constitute no element of damages for which they, or the plaintiff for them, had any right of recovery. The act in question constitutes a new or additional cause of action. The right of the parties were fixed under the law as it existed at the time of the injury complained of, and any law which undertook to change those rights would be retrospective and void, as it would be a matter which affected the right and not merely the remedy, as has been insisted in argument.

For this error in the charge the judgment of the circuit court must be reversed and a new trial awarded.

ADDISON, Adm'r,

v.

LAKE SHORE AND MICHIGAN SOUTHERN RY. CO.

(48 *Michigan Reports*, 155.)

A declaration in case for a fatal railway injury is demurrable if it does not so state the cause of action that the defendant can, with reasonable certainty, ascertain in what respect it is charged with negligence, or if it does not count specifically upon some particular duty and breach thereof as causing

the injury; it is not enough to refer to matters in an uncertain, doubtful and ambiguous manner as a kind of general drag to meet whatever evidence may be presented.

ERROR to Wayne. Submitted April 4. Decided April 19.
Case. Plaintiff brings error. Affirmed.
James H. Pound for appellant.
Wm. H. Wells and Ashley Pond for appellee.

MARSTON, J.—The defendant demurred to the plaintiff's declaration, and the demurrer was sustained.

The objection to the declaration was not because of a want of words, but because of the arrangement thereof. There was not a clear and concise statement of the plaintiff's cause of action, from which the defendant could with reasonable certainty ascertain wherein it had been guilty of negligence, and prepare to meet the charge. Many things were referred to in an uncertain, doubtful and ambiguous manner as a kind of general drag to meet the evidence, whatever it might be; but no particular duty, and breach thereof as causing the injury, was specifically counted upon. We do not deem it necessary to point out the objectionable features in some of the general counts.

The judgment will be affirmed with costs.

BARNUM, Adm'x, etc.,

v.

CHICAGO, M. AND ST. P. RY. CO.

(*Advance Case, Minnesota. June* 14, 1883.)

In an action under section 2, c. 77, Gen. St. Minnesota, 1878, the complaint, where it states the names of the next of kin, and how they were related to the deceased, with an allegation of damage to them, is sufficient, so far as pleading the damages is concerned.

APPEAL from an order of the District Court, Hennepin County.
Merrick & Merrick for respondent.
W. H. Norris (D. S. Wegg, of counsel) for appellant.

GILFILLAN, C. J.—Action by an administrator for negligently causing the death of his intestate. The complaint alleges that the deceased left no widow, legal issue, nor father, but left next of kin his mother and brother and sisters, giving the name of each, and alleges that this action is brought for the exclusive benefit of the said next of kin of the said deceased and this plaintiff, and the said next of kin of the said deceased, as aforesaid, have suffered

damage by reason of the killing of said deceased in the sum of $5000. A demurrer to the complaint was overruled. The particular objection to the complaint is that there can be no cause of action where there is no damage; that damages to the next of kin are not in such cases implied by law, but must be shown to have actually occurred; that they are, therefore, in their nature special, and must be specially pleaded. In other words, facts showing that damages in fact occurred, and how, must be set forth.

No case has been before this court requiring any decision of the question, nor of any necessarily involving it. It has been before the courts of other States upon statutes closely resembling ours. In Safford *v.* Drew, 3 Duer, 627, it was held that the complaint must show that there are persons who have sustained a pecuniary loss, which is undoubtedly correct. In Regan *v.* Chicago, M. & St. P. Ry. Co., 51 Wis. 599, it was held that the damages must be specially pleaded, and that a complaint with only a general allegation of damage is not good. In Lyon *v.* Railroad Co., 7 Ohio St. 337, and in Railroad Co. *v.* Shannon, 43 Ill. 338, it was held that upon such a complaint nominal damages, at least, can be recovered; and it appears to have been assumed by the court in Oldfield *v.* Railroad Co., 14 N. Y. 310, and Quin *v.* More, 5 N. Y. 482. The latter decision we think most consonant with the terms and intent of our statute. It reads: "Where death is caused by the wrongful act or omission of any party, the personal representatives of the deceased may maintain an action, if he might have maintained an action had he lived, for an injury caused by the same act or omission. . . . The amount recovered is to be for the exclusive benefit of the widow and next of kin, to be distributed to them in the same proportions as the personal property of the deceased person." The statute assumes that the widow and next of kin have a reasonable expectation of pecuniary benefit, as of right or otherwise, and to a greater or less extent, from the continuance of life, which they lose by the act or omission causing the death, and this expectation is taken as the basis of the damages; as said by this court in Schwarz *v.* Judd, 28 Minn. 371. The theory of the statute is that they have a pecuniary interest in the life of the deceased, and its object is to compensate them for their loss caused by his death. Such being the theory of the statute, it necessarily implies some damage from the death. And where, as in this case, the complaint states the names of the next of kin, and how they were related, with an allegation of damage to them, it is a sufficient pleading upon which to recover all the damages that can be recovered in such an action. To require the plaintiff to go further and set forth in detail the various circumstances proper for a jury to consider in arriving at the amount of damage, would be requiring him to plead evidence.

Order affirmed.

ATCHISON, TOPEKA AND SANTA FE R. R. CO.

v.

CRUZEN.

(*Advance Case, Kansas. April* 1, 1884.)

In an action under the Kansas stock law of 1874 the railroad defended upon the ground, among others, that the road upon which the animal was injured was not owned, leased, or operated by it. As tending to show that the defendant company was the lessee of the road, and that one T. was its general agent, a circular or folder, obtained in the office of another railroad company, was introduced in evidence. *Held*, that as it was not shown that the company either issued or distributed the circular or folder, and as the circular or folder was not brought home in any manner to the defendant company or its agents, its admission as evidence was material error.

ERROR from Leavenworth County.

Geo. R. Peck, A. A. Hurd, and Robert Dunlap for plaintiff in error.

W. W. Black for defendant in error.

HORTON, C. J.—On June 29, 1883, a cow belonging to the defendant in error (plaintiff below) was injured in the county of Leavenworth, by an engine operated on what is commonly known as the Leavenworth, Topeka & Southwestern Ry. On August 9, 1883, plaintiff below brought his action before a justice of the peace of Leavenworth county to recover damages for the injury to his cow, and for attorney's fees, against the Atchison, Topeka & Santa Fe R. R. Co., under the stock law of 1874. After judgment was rendered by the justice of the peace, the railroad company appealed to the district court. Trial was had in that court, and judgment rendered against the company for $55 damages and $30 attorney's fees.

The railroad company contested the case upon the ground, among others, that the Leavenworth, Topeka & Southwestern Ry. was not owned, leased, or assigned by or to the Atchison, Topeka & Santa Fe R. R. Co., and that said company did not operate the line in Leavenworth county. As tending to show that the Atchison, Topeka & Santa Fe R. R. Co. was the lessee of the Leavenworth, Topeka & Southwestern Ry., and that one A. B. Tanner was the general agent of the Atchison, Topeka & Santa Fe R. R. Co. at Leavenworth, W. W. Black was produced as a witness on the part of the plaintiff below, and testified that the circular and map which he presented was obtained by him at the office of the Leavenworth, Topeka & Southwestern Ry. Co.; that this circular, with a number of others like it, he found

at the office; that they appeared to be there for public distribution, as he frequently saw circulars like it at the same place. Thereupon, this circular and map was received in evidence, over the objection of the railroad company. This circular and map purported to be put out by the Atchison, Topeka & Santa Fe R. R. Co. as an advertisement of their route, and contained what purported to be a map of the Atchison, Topeka & Santa Fe R. R., leased lines, and connections. It also purported to contain a list of the agents of the company, and among others the name of A. P. Tanner, as general agent at Leavenworth. Under the topic of "Old Mexico" it contained the statement: "To reach Guaymas, take the Atchison, Topeka & Santa Fe R. R. at Kansas City, Leavenworth, or Atchison," etc. The circular also stated: "Having its eastern terminus at Atchison and Leavenworth, Kansas," etc. This circular or folder was not obtained in any office of the Atchison, Topeka & Santa Fe R. R. Co., and as it was not proved that the company either issued it or distributed it, its admission as evidence was erroneous. The company objected to its introduction upon the ground that it was incompetent, irrelevant, and immaterial, and on the further ground that it was not shown to have been put out by it. The objections should have been sustained.

Counsel for plaintiff below suggest that even if there was error in the admission of the circular or folder, there was evidence afterwards admitted which cured the error; and, even without the folder, that there was plenty of evidence to sustain the verdict. In view of the testimony of A. A. Robinson, assistant superintendent and chief engineer of the Atchison, Topeka & Santa Fe R. R. Co., that at the time of the injury complained of the latter company had not been the owner, assignee, or lessee of any railroad in the county of Leavenworth, and had not been the owner, assignee, or lessee of the Leavenworth, Topeka & Southwestern Ry.; and in the absence from the record of any evidence showing that the circular or folder was brought home in any manner to the railroad company or its agents—we cannot say that the error was either cured or immaterial. Really, we cannot say what effect this evidence may have had on the minds of the jury. For aught we know, it may have been controlling with them in the rendition of the verdict.

The judgment of the district court must therefore be reversed, and the cause remanded for a new trial.

Liability of Lessee.—Where a railroad has been duly leased by competent authority the lessee alone is liable for torts committed by it while operating the road. Sprague v. Smith, 29 Vt. 421; McMillan v. Michigan S. & N. I. R. R. Co., 16 Mich. 79, 102; Ditchett v. Spuyten Duyvil & P. M. R. R. Co., 67 N. Y. 425; Wasmer v. D., L. & W. R. R. Co., 80 N. Y. 212; s. c. 1 Am. & Eng. R. R. Cas. 122; Fontaine v. Southern Pac. R. Co., 1 Am. & Eng. R. R.

Cas. 159; Dickson *v.* C., R. I. & P. R. Co., 2 Am. & Eng. R. R. Cas. 538; Pittsburg, etc., R. R. Co. *v.* Hunt, 2 Am. & Eng. R. R. Cas. 649; Central R. R. Co. *v.* Brinson, 8 Am. & Eng. R. R. Cas. 343.

Statutory Liability of Lessee.—Statutes imposing certain duties upon railroad companies are usually construed to refer to the company actually operating the road. Hall *v.* Brown, 54 N. H. 495; Stephen *v.* Smith, 29 Vt. 160; Pierce *v.* Concord R. Corp.. 51 N. H. 590; Hall *v.* Brown, 54 N. H. 495; Lamphear *v.* Buckingham, 33 Conn. 237; Linfield *v.* Old Colony R. R. Co., 10 Cush. 562; Davis *v.* Providence & W. R. Co., 121 Mass. 134.

Statutes of this character which are intended to protect the interests of the public at large are sometimes construed to refer to and to render liable both lessor and lessee. Nelson *v.* Vt. & C. R. R. Co., 26 Vt. 717; Clement *v.* Canfield, 28 Vt. 302; McGrath *v.* New York Cent. & Hud. River R. R. Co., 63 N. Y. 522; Whitney *v.* Atlantic & St. L. R. R. Co., 44 Me. 362; Stearns *v.* Atlántic & St. L. R. R. Co., 46 Me. 95; Wyman *v.* Penobscot & K. R. R. Co., 46 Me. 162; Bean *v.* Atlantic & St. L. R. R. Co., 63 Me. 293; Ingersoll *v.* Stockbridge & P. R. R. Co., 8 Allen, 438; Illinois Central R. R. Co. *v.* Kanouse, 39 Ill. 272; Toledo, P. & W. R. R. Co. *v.* Rumbold, 40 Ill. 143; Freeman *v.* Minneapolis, etc., R. Co., 7 Am. & Eng. R. R. Cas. 410; St. Louis, W. & W. R. Co. *v.* Curl, 11 Am. & Eng. R. R. Cas. 458. But see Murch. *v.* Concord R. R. Co., 29 N. H. 935; Parker *v.* Rensselaer & S. R. R. Co., 16 Barb. 315.

Missouri Pacific Ry. Co.

v.

Lynch.

(*Advance Case, Kansas. March* 6, 1884.)

When a railway company makes cattle-guards on its railroad where it enters and leaves improved or fenced land and such cattle-guards are insufficient, and the company then enters into an agreement with the occupant of the premises, that if he will take away his old fences near the cattle-guards and move them to another line near the railroad so as to enclose his premises at different points than where the land was enclosed when the first cattle-guards were built, the company would erect new cattle-guards at the places to which the fences were to be changed, and thereupon the occupant removes his fences and the company does not comply with its promise, but neglects to erect cattle-guards at the places where the road enters and leaves the land as newly fenced, it is liable for all damages sustained thereby.

Error from Franklin County.

W. A. Johnson for plaintiff in error.

———— for defendant in error.

Horton, C. J.—This action was originally commenced by Jacob Lynch, as plaintiff against the Missouri Pacific Ry. Co., as defendant, before a justice of the peace of Franklin County. The bill of particulars alleged that the plaintiff from March 1, 1881, to

March 1, 1882, occupied and farmed the southwest quarter of section 33, township 18, range 21, in Franklin County, Kansas, over and upon which land the defendant, during that period of time maintained and operated its railroad line; that during the spring and summer of 1881 the defendant neglected to erect and maintain a cattle-guard at the point on the east side of the premises where the defendant's track entered and left the plaintiff's improved land; in consequence of said neglect on the part of the defendant the stock of others than the plaintiff entered upon the plaintiff's premises and ate and destroyed his growing crops thereon to his damage in the sum of $300.

The railway company filed its answer to the plaintiff's bill of particulars, denying all the allegations therein and alleging that whatever loss the plaintiff had sustained was caused by the insufficiency of his fences; that the company put in good and sufficient cattle-guards at the point where its line of railroad entered and left the improved and fenced land of the plaintiff, but that the latter after he had planted his crop removed his fence from that point to another and left his field open in many places, and by his own negligence exposed his field to stock, and by his own carelessness his crops were destroyed.

This case was tried before a justice of the peace, the plaintiff recovered and the company took an appeal to the district court. The case was tried in that court and judgment rendered in favor of the plaintiff. The company excepted. The objections made to the rulings of the trial court are not tenable.

It is insisted on the part of the railway company that as it put in cattle-guards where the road entered and left the land of the plaintiff, as it was originally fenced, it complied fully with the requirements of the statute. Secs. 37–39, ch. 84, comp. Laws of 1879. It is further insisted that as the company had once put in cattle-guards at the points designated by the statute, it was not required to take them up and follow to such other different place as the plaintiff afterwards removed his fence to.

It appears from the evidence that after the cattle-guards were first built by the company, the plaintiff tore down his fence on the east side of his enclosed land and removed it away from the cattle-guard as then constructed about forty rods.

In the first place, there was testimony before the trial court tending to show that the cattle-guards, as erected, were not sufficient or proper cattle-guards. Further than this, there was evidence tending to prove that before the plaintiff tore down his fence on the east side of his enclosed land and removed the same to another point, he saw the road-master of the railway company and made an agreement with him that the company would erect a cattle-guard at the place where the fence was to be rebuilt. This the company failed to do within a reasonable time. Therefore the

railway company was liable for all damages sustained by the plaintiff by its negligence in the premises.

The judgment of the district court must therefore be affirmed.

See Pittsburg, Cincinnati & St. Louis R. Co. *v.* Haskell, and note, 13 Am. & Eng. R. R. Cas. 555.

WABASH, ST. LOUIS AND PACIFIC RY. CO.

v.

ZEIGLER.

(107 *Illinois Reports*, 304.)

To entitle an owner of land over which a railroad is operated, to recover of the railroad company double the value of any fence built by him upon its neglect to so on proper notice, the statute must be strictly followed, and the fence must be such as the statute requires, and be built in the mode the statute contemplates. The fence must be built on the sides of the railroad. If built two feet inside of the right of way this penalty cannot be recovered. It is not held, however, that the fence may not be built entirely on the company's right of way, but in doing so it must be on the sides of the road.

APPEAL from the Appellate Court for the Third District; heard in that court on appeal from the County Court of DeWitt County.

Moore & Warner for the appellant.

R. A. Lemon and F. M. Burroughs for the appellee.

SHELDON, C. J.—This was an action brought by the adjoining owner, against the railroad company, under the statute (Rev. Stat. 1874, p. 808, sec. 41), to recover double the value of a fence built by such owner to fence his land from the railroad. There was judgment for the plaintiff for such double value, which was affirmed by the appellate court for the third district, and on the proper certificate being made, the defendant appealed to this court.

The statute requires that every railroad corporation shall, within six months after its line is opened for use, erect fences "on both sides of its road," and provides that on neglect to do so, the owner of the adjoining land, after having given thirty days' notice in writing to the railroad corporation to build the fence, and its refusal to build, shall have the right to enter upon the land and track of the railroad company, and may build such fence, and shall be entitled to double the value thereof from the corporation, with interest at one per cent per month.

The sole point presented for consideration is upon the place of building the fence. The appellate court certifies "that the proof

in this case shows that the fence and gates in question, as built by the appellee, were intentionally built by him two feet inside the right of way of the appellant on each side of its railroad track. If this proof sustains the declaration, under the statute the finding of the court below is sustained by the evidence. If, on the contrary, the law requires the fence to be built on the line of the right of way, then the finding is not sustained. This court held, in deciding this case, that the law does not require the fence to be built upon the line, but may be built entirely on the railroad company's right of way, and the person building it recover under the statute under which this suit was brought." The railroad was entirely on appellee's land, and he built both lines of fence. The fence was a post and board fence. The declaration avers the fence was built "on both sides of said railroad."

To recover upon this penal liability of double the value of the fence, the statute should be strictly followed in the building of the fence. The fence should be such an one as the statute requires and authorizes, built in the mode the statute contemplates. Such a fence is one on the sides of the railroad. The fence in question was not built on the side of the railroad, but was intentionally built two feet inside the right of way,—two feet from the side of the road,—thus depriving appellant of four feet of his right of way, and appropriating the same to appellee's use by fencing it in with his own land. If appellee intentionally and of set purpose may do this, we do not see why he might not take in a yet greater number of feet, and where would be the limit short of the railroad's actual track? The railroad is entitled to the unobstructed use of its entire right of way, except so much as may be necessary for a fence. This same statute makes it the duty of all railroad corporations to keep their rights of way clear from all dead grass, dry weeds, or other dangerous, combustible material, etc. It should not be permitted to appellee, by fencing off a portion of the right of way, to make the performance of this duty more difficult and expensive to the railroad company. We do not hold that the fence might not be built entirely on the railroad company's right of way, but that in doing so it should have been built on the side of the road, and not, as it was in this case, two feet inside the right of way. To entitle to a recovery under this statute the fence must be built where the statute requires it should be—on the side of the railroad. It was not so built here.

The judgment must be reversed and the cause remanded.

Judgment reversed.

ATCHISON, TOPEKA AND SANTA FE R. R. CO.

v.

DAVIS.

(*Advance Case, Kansas. March* 6, 1884.)

Where the owner of a colt confines it in an enclosure surrounded by a sufficient and safe fence, and in the night time without any fault or negligence on his part, a gate is opened and left open through the misconduct or negligence of some unknown party, and through this open gate the colt escaped on to the track of a railroad company; *held*, that the company is bound to use ordinary care to prevent any injury to such colt from its trains.

ERROR from Lyon County.

For plaintiff in error Geo. R. Peck, A. A. Hurd, W. C. Campbell, C. N. Sterry.

For defendant in error Scott & Lynn.

BREWER, J.—This was an action brought by defendant in error, plaintiff below, to recover the value of a colt killed by being struck by a passing train on defendant's railroad. The action was commenced before a justice of the peace, and after judgment, appealed to the district court, where the case was tried before a jury. The case was tried on the bill of particulars filed before the justice and without any new or additional pleadings. The verdict and the judgment were in favor of the plaintiff, and defendant brings the case to this court. The bill of particulars alleged that the colt was killed through the negligence of defendant, and also that the road was not fenced at the place of killing. The latter charge was not supported by the testimony and was disregarded by the jury. The case was therefore disposed of upon the theory that the defendant was guilty of actual negligence in the killing of the colt. Among the undisputed facts are these: the colt was kept in the fair grounds just west of Emporia in Lyon County. Between the fair grounds and the railroad track was a fence, in which about midway was a gate used principally during fair time by persons passing backwards and forwards from trains to the fair grounds. At times when the fair was not being held, the gate was occasionally left open by tramps passing up and down the railroad track, and other persons. During the night prior to the injury complained of, in some undiscovered way the gate was opened and left open. Early in the morning the colt with three or four others, which were running loose in the fair grounds, passed through this open gate on to the defendant's right of way. While on the right of way an emigrant train came from the west. The other colts kept off the track, but this one got on to it and ran eastward toward the city of

Emporia, followed by the train until near the east line of the fair grounds, when its course being stopped by an open bridge it was struck by the train and killed. No negligence can be imputed to the defendant in the manner in which the colt escaped from the fair grounds and got on to the right of way, and the question therefore was whether there was negligence in the management of the train.

The jury answered this question in the affirmative, and while the testimony was not absolutely conclusive, there was ample to warrant the answer. It seems probable that a little effort and care on the part of the persons in charge of the train might have avoided the accident, so that really the only substantial question arises on the rulings of the court in respect to the instruction. The court refused an instruction to the effect that the defendant was not liable, unless it killed the colt, wilfully, wantonly, or through gross negligence, and instructed the jury substantially that it was liable for ordinary negligence. While some other criticisms are placed upon the instruction, this is the pivotal question. If the ruling was right in this respect, the other matters referred to must be regarded as immaterial, and the judgment must stand; if not, the judgment must be reversed. Counsel for the company rely largely on the case of Railroad Co. *v.* Rollins, 5 Kas. 168, in which the company was held liable only for gross negligence. They insist that the principles there laid down have been since frequently affirmed by this court, and are controlling and decisive in the case at bar. We think not. Without intending any departure from those principles we think that case is not in point. There the plaintiff living in the vicinity of the railroad track turned his cattle loose on uninclosed fields, from which they strayed on to the railroad track and were killed by a passing train. In so doing he was chargeable with some blame. He knew the unfenced condition of the road, knew of the passing trains, and knew that his cattle turned loose might very naturally wander in the direction of the track. Hence, it could not be said that he was entirely without fault. But in the case at bar the plaintiff was without any fault. He took all reasonable precautions to confine his colt, placed it in a field inclosed by a secure and safe fence. Without any fault on his part, and through the misconduct or negligence of some unknown person in the night time the gate was left open, and through it the animal wandered on to defendant's track. While technically the animal was a trespasser, yet he was so trespassing after reasonable precautions had been taken by the plaintiff, and without any fault on his part. Under those circumstances the company was bound to use ordinary care to prevent injury. The case of Railroad Co. *v.* Brown, 14 Kas. 469, is in its facts very much in point. There the plaintiff's stock had been by him shut up in his barn, and without any fault on his part in the night time got out

therefrom and strayed on to the railroad track and were killed. In that case the company was held liable. It is true this particular question was not then discussed or specially considered so that the case is not a direct authority. See also Railroad Co. *v.* Wilson, 28 Kas. 635; s. c. 11 Am. & Eng. R. R. Cas. 447; Railroad Co. *v.* Riggs, supra. It is true that authorities in other States are conflicting on this question. See the various authorities cited in briefs of opposing counsel. We think in principle, however, it is more just and fair that where the owner of stock is without fault, and has taken every reasonable precaution to keep his animals confined, and through some unexpected casualty or misconduct or negligence of a third party, the animals escape from such confinement on to the grounds of another, the latter should use ordinary care to prevent their being injured. See in support of these views the following authorities, from other States: Pearson *v.* Milwaukee, etc., Ry. Co., 45 Ia. 497; Rockford, etc., R. R. Co. *v.* Rafferty, 73 Ill. 58; Baltimore, etc., R. R. Co. *v.* Mulligan, 45 Md. 486; Bemis *v.* Conn., etc., R. R. Co., 42 Vt. 375; Cincinnatti & Zanesville R. R. Co. *v.* Smith, 22 Ohio St. 244; Ill. Cent. R. R. Co. *v.* Baker, 47 Ill. 295; Little Rock & Ft. S. Ry. Co. *v.* Finley, 37 Ark. 562; Richmond *v.* Sacramento, etc., R. R. Co., 18 Cal. 351.

Again, it is insisted that plaintiff's bill of particulars charged the defendant with liability on account of the lack of a fence; and that therefore, evidence of negligence was improperly overruled. It is true the bill of particulars alleged the lack of a fence, but it also counted on the negligence of defendant, and while plaintiff failed to prove the former he did the latter. This he might do. Stewart *v.* Railroad Co., 27 Kas. 631. If there was any lack of definiteness in the allegation of negligence, it should have been corrected by motion. We see nothing else requiring notice, and the judgment will be affirmed.

Analogous Cases.—Harrington *v.* Chicago, etc., R. Co., 71 Mo. 384; Richardson *v.* C. & N. W. R. Co., 13 Am. & Eng. R. R. Cas. 654.

SCHERTZ

v.

INDIANAPOLIS, BLOOMINGTON AND WESTERN RY. CO.

(107 *Illinois Reports*, 577.)

Under the act in relation to fencing and operating railroads, in force July 1, 1874, as amended by the act of 1879, where a party's horse gets on the railroad track for want of such a fence as the law requires the company to erect and maintain to enclose its track and right of way, and while on the

track is frightened either by the approaching train, or the sound of the bell or whistle, or all of them combined, and in its flight is injured, either by jumping a cattle-guard, or by coming in contact with a wire fence, or both, and no negligence or wilful misconduct is chargeable to the agents of the company in charge of the train at the time, and where no injury is done to the horse by any actual collision or contact with the engine or cars of the train, the railroad company will not be liable to the owner of the horse for such injury.

The true meaning of section 1 of "An act in relation to fencing and operating railroads," as amended in 1879, is, that the injury to stock must be caused by actual collision,—that is, it must be done by the "agents, engines or cars" of the company, or the wilful misconduct of the train men, to make the company liable.

Consequential damages resulting from fright to animals, not caused by actual collision, or any negligence or wilful misconduct on the part of the servants of the company, are not embraced in the statute.

APPEAL from the Appellate Court for the Third District. Heard in that court on appeal from the Circuit Court of McLean county.

W. C. Capen for the appellant.

One great object of the statute was to protect persons and property from the dangers of stock getting on the tracks of railroads, and the construction of it should be such as most effectually to carry out that object. The ground of recovery under this statute is the failure to build the fences required. No other fault in such case need be shown. Cairo & St. Louis R. R. Co. *v.* Murray, 82 Ill. 76.

While appellee continued to run its cars on the track through appellant's field without fencing its track, it undertook, at its peril, that no harm should come to appellant's horse for want of a proper fence. McCoy *v.* California P. R. R. Co., 40 Cal. 532.

Rowell & Hamilton for the appellee.

Under the statute, which is penal, and must be strictly and literally construed, the railroad company is only liable, in any event, for the damage which may be done by the "agents, engines or cars" of the railroad. If, then, it is clearly shown that the horse was not injured or struck by the "agents, engines or cars," but was injured by being frightened by one passing train, and ran against some one else's fence, the company could not be liable, unless its servants wilfully and maliciously frightened the animal.

This case is almost identical, in facts and circumstances, with P. and I. R. R. Co. *v.* Haskett, 10 Ind. 409, and the court there held the law to be just as the Appellate Court held it in this case. This decision was also strongly and expressly reaffirmed in Ohio & Mississippi Ry. Co. *v.* Cole, 41 Ind. 331; Indianapolis, Bloomington & Western Ry. Co. *v.* McBrown, 46 Id. 229; B., P. & C. Ry. Co. *v.* Thomas, 60 Id. 107; J., M. & I. R. R. Co. *v.* Downey, 61 Id. 287. The case of Lafferty *v.* Hannibal & St. Joseph R. R. Co., 44 Mo. 291, is also exactly in point, and approves the Indiana cases. The same construction has also been

given our statute by a court of high authority in this State, besides in this case. Chicago & Northwestern R. R. Co. *v.* Taylor, 8 Bradw. 108. See, also, Redfield on Railways, 493.

PER CURIAM.—This action was brought by Joseph Schertz, before a justice of the peace, against the Indianapolis, Bloomington & Western Ry. Co., under section 1 of "An act in relation to fencing and operating railroads," in force July 1, 1874, as amended by the act in force July 1, 1879, to recover for injuries done to his horse by defendant operating its road. On the trial before the justice of the peace plaintiff recovered a judgment, and on the appeal of defendant to the Circuit Court, where a trial de novo was had, plaintiff recovered a judgment in a like amount, with an attorney's fee. That judgment, on the appeal of defendant, was reversed in the Appellate Court for the Third District, and final judgment rendered against plaintiff for costs. A majority of the judges of the Appellate Court having certified that the case, in their opinion, involves a question of law of such importance, on account of collateral interests, that it should be passed upon by the Supreme Court, plaintiff brings the case to this court on appeal

But a single question arises on the record, as the case now comes before this court, and that has relation to the true construction of section 1 of the act cited supra. That statute provides, when the fences it requires shall be erected are not made as therein required, or when such fences are not kept in good repair, such railroad corporation shall be liable for all damages which may be done by the "agents, engines or cars" of such corporations, to cattle, horses, or other stock. On the hypothesis that plaintiff's horse got on the track of defendant's road for want of such a fence as the law requires it to erect and maintain to enclose its track and right of way, and while on the track the horse was frightened either by the approaching train, or the sound of the bell or whistle, or all of them combined, and in its flight was injured, either by jumping a cattle-guard, or by coming in contact with a wire fence, or both, no negligence or wilful misconduct can be imputed to the agents of defendant in charge of the train at the time, and that no injury was done to the horse by any actual collision or contact with the engine or cars of the train, a majority of the court are of opinion that the defendant is not liable. It is thought the true meaning of the section of the statute cited is, the injury must be caused by actual collision,—that is, it must have been done by the "agents, engines or cars" of defendant. Here no direct injury was done either by the "agents, engines or cars" of defendant, nor by any wilful misconduct of the train men.

In P. & I. R. R. Co. *v.* Haskett, 10 Ind. 409, in construing a statute on the same subject, which made the corporation liable for stock that should be "killed or injured by the cars or locomotives

or other carriages of the company," the court held that these words, in their ordinary import, evidently involved the idea of actual collision, and hence would not cover a case of consequential damages. In Lafferty v. Hannibal & St. Joseph R. R. Co., 44 Mo. 291, it was admitted that at the place where the injury was done to plaintiff's horse defendant's railroad was not fenced as required by statute. The words of the statute cited in that case are identical with the words contained in the statute of this State on the same subject,—that is, in case of a failure to comply with the provisions of the statute, the railroad corporation should be liable for all damages that might be done by its "agents, engines or cars." In that case, as in the one being considered, there was no collision, and the horse was not injured by any actual contact, and it was held the defendant corporation was not liable. It is thought the statute of this State admits of the same construction, and in a case where the stock is not killed or injured by any actual collision there is no liability on the railroad corporation. Consequential damages resulting from fright to animals, not caused by any negligence or wilful misconduct on the part of the servants of the corporation, are not embraced in the statute.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Injuries not Resulting from Contact with Train.—Where a railroad company fails to observe some statutory duty, and in consequence animals are injured upon its track, it is not usually held liable if the injury is not produced by actual contact with the train. Moshier v. Utica, etc., R. C., 8 Barb. 428; Lafferty v. Hannibal, etc., R. Co., 44 Mo. 292; Peru, etc., R. Co. v. Haskett, 10 Ind. 409; Ohio, etc., R. Co. v. Cole, 41 Md. 331; Indianapolis, etc., R. Co. v. McBrown, 46 Ind. 229; Louisville, etc., R. Co. v. Smith, 58 Ind. 575; Baltimore, etc., R. Co. v. Thomas, 60 Ind. 107; Seibert v. Missouri, etc., R. Co., 6 Am. & Eng. R. R. Cas. 584; Holder v. Chicago, etc., R. Co., 12 Am. & Eng. R. R. Cas. 567.

The following authorities are to the contrary effect: Houston & T. C. R. Co. v. Terry, 42 Tex. 451; Atchison, etc., R. Co. v. Jones, 20 Kans. 527; Atchison, etc., R. Co. v. Edwards, 20 Kans. 531; Young v. St. Louis, etc., R. Co., 44 Iowa, 172.

LANE

v.

KANSAS CITY, FORT SCOTT AND GULF R. R. CO.

(*Advance Case, Kansas. March* 4, 1884.)

A railroad company, in operating its road across a public highway, is required to exercise ordinary care and diligence, and is liable for killing cattle

which are rightfully upon such highway, if it fails to exercise such care and diligence.

ERROR from Miami County.
Beeson and Baker for plaintiff in error.
Blair and Perry for defendant in error.

VALENTINE, J.—This was an action brought by George W. Lane against the Kansas City, Fort Scott and Gulf R. R. Co. to recover damages for negligently killing two of the plaintiff's cows at a public crossing and appropriating the hides to its own use. The answer was a general denial. Before the trial, the defendant offered to confess judgment for the value of the hides, $8.50, and the offer was declined. The case was tried before the court and a jury, and the jury found a general verdict in favor of the plaintiff and against the defendant for the admitted value of the hides. The plaintiff then filed a motion for a new trial, setting forth various grounds, which motion was overruled by the court, and judgment was rendered upon the verdict. To reverse this judgment and the order of the court overruling the plaintiff's motion for a new trial, the plaintiff now prosecutes a petition in error in this court.

The errors alleged in this court are founded upon the instructions given by the trial court to the jury. The instructions complained of are the sixth, eighth, ninth, tenth, eleventh, twelfth and thirteenth. The sixth instruction was technically erroneous, but probably the error was immaterial. The eighth was probably correct; but the ninth we would think was materially erroneous. It reads as follows:

"No. 9. Under the pleadings and evidence in this action, the defendant is not liable, unless it was guilty of gross negligence with reference to the acts complained of, and such gross negligence must be proven to exist, and to have been the direct cause of the injury set forth in the plaintiff's petition in this action. Gross negligence is the want of slight diligence, and in this action there must have been an absence of even slight care on the part of the defendant before plaintiff can recover."

The plaintiff's petition, besides stating the facts of his case sufficiently, also alleges that the defendant's employees in killing the plaintiff's cows "were guilty of gross carelessness and a reckless disregard for the rights of others," and the evidence shows, among other things, the following: the cows were killed where the defendant's railroad track crosses a public road. The plaintiff's servant was driving them along the public road, toward their home, when, just as they entered upon the railroad track, the engine of a passing train struck the cows and killed them almost instantly. There were circumstances which tended to show culpable negligence on the part of both the railroad company and the plaintiff, though

possibly neither was guilty of culpable negligence. We think the evidence was such, however, that the questions whether either was guilty of culpable negligence or not, were questions of fact for the jury, and not questions of law for the court. Then what were the rights of the parties respectively on the railroad track and on the public road where the cows were killed? And what degree of care and diligence was each required to exercise to avoid the injury to the plaintiff's cows? Each undoubtedly had a right to pass over the ground where the plaintiff's cows were killed, and neither was a trespasser there. The plaintiff undoubtedly had a right to have his cows driven along the public highway, and the railroad company also had a right to operate its railroad across the public highway, their rights being equal in this respect, and neither having a paramount right over the other. From this, we think it follows that each was bound to exercise ordinary care and diligence toward the other, and each was bound to exercise ordinary care and diligence for the protection of his or its own rights and property. The want of such care and diligence would be ordinarily negligence, and as we think, culpable negligence; while the exercise of that degree of care and diligence would not, and could not in this case, as we think, constitute culpable negligence. The foregoing instruction, however, says in effect that the railroad company was not required to exercise ordinary care and diligence, but was required to exercise only slight care and diligence, and is liable only for gross negligence. In this we think the instruction is erroneous; and this, notwithstanding the fact that the plaintiff alleged in his petition that the defendant's employees in killing the cows "were guilty of gross carelessness and a reckless disregard for the rights of others." The use of the word "gross" was wholly unnecessary. It may be that in fact the plaintiff is not entitled to recover in this case; for it may be that in fact the railroad company exercised ordinary care and diligence, and was not guilty of even ordinary negligence; or it may be that in fact the plaintiff did not exercise ordinary care and diligence and was guilty of ordinary negligence; but as the case was not submitted to the jury upon the theory that the railroad company was required to exercise ordinary care and diligence, or that it was responsible for ordinary negligence, we cannot tell what the opinion of the jury was upon these subjects.

For the error committed by the court below, in giving said instruction, the judgment of the court below must be reversed, and the cause remanded for a new trial. We hardly think it is necessary to comment upon the other instructions complained of.

Judgment reversed.

MISSOURI PACIFIC RY. CO.

v.

KING.

(*Advance Case, Kansas. March* 6, 1884.)

When cattle running at large are killed by a railroad company at a public crossing, the company is liable when the killing is caused by its culpable negligence or by that of its agents or employees.

A hand-car was moving along the track of a railroad company at a high rate of speed. A cow was moving slowly towards the crossing and might have been seen by those on the car two or three hundred feet off. No attempt, however, was made to put down the brake until within about thirty feet of the cow, who was then directly on the crossing. The brake being worn smooth did not operate, and the car ran over the cow, killing it. *Held*, that there was evidence of negligence on the part of the railroad company which should be submitted to a jury.

ERROR from Anderson County.

W. A. Johnson for plaintiff in error.

L. K. Kirk for defendant in error.

PER CURIAM.—This was an action to recover damages for the killing of a cow by a hand-car on defendant's railroad. The judgment must be affirmed on the authority of the R. R. Co. *v.* Wilson, 28 Kan. 637; s. c. 11 Am. & Eng. R. R. Cas. 447. The injury having been done at a public crossing, the court instructed the jury to find a verdict for the defendant, unless the injury was caused by the culpable negligence of the defendant, its agents or employees. Of this, the company has no cause of complaint. The testimony was in some respects contradictory, but there was testimony, sufficient to sustain the verdict, showing that the hand-car was coming at an unusual rate of speed on a down grade, with a strong wind in its favor and helping to increase the speed. The cow was seen some two or three hundred feet before the crossing was reached. She moved slowly and deliberately toward the track, but no brake was applied until the car was within thirty feet of the crossing. The car had been used some time, and the brake was smooth and could not stop the car before it struck the cow. If it had been in good condition, the car might have been stopped, even after the brake was in fact applied, and if it had been applied a hundred feet before the crossing was reached would have stopped the car as it was. There was some portion of one of the instructions referring to other and improved hand-cars which was perhaps not strictly applicable; and yet, as appears from the answers of the jury, to special questions, it obviously in no manner affected the verdict. While there was this testimony as above described suffi-

cient as we think to show negligence, it should also be stated that there was testimony of a different tendency given by the defendant, which would have warranted the jury in finding due care. But questions of fact of this nature upon opposing testimony are settled by the triers of fact. The judgment will be affirmed.

BURLINGTON AND M. R. R. CO.
v.
FRANZEN.

(*Advance Case, Nebraska. January* 18, 1884.)

A railroad company which fails to fence its track at a place where by statute it is required to fence is liable for stock killed or injured on its track by its engines or cars, and the mere negligence of the owner of the stock is no defence.

ERROR from Cass County.
Marquette & Deweese for plaintiff.
A. Beson for defendant.

MAXWELL, J.—This is an action brought by the defendant in error to recover the value of a cow killed by the cars of the plaintiff, at a point on its railroad where it was required by statute to fence its track, but had failed to do so. The railroad company, in its answer, admits that the cow was killed by an engine on its railroad track, which at the time was operated by the company's agents, and that notice and affidavit of the killing was duly served on the company's agents, etc. For further answer it is alleged that said "killing occurred by reason of the fault and negligence of the plaintiff, and without any fault or negligence on the part of the defendant." There is no reply, and it is strongly urged on behalf of the plaintiff in error that the allegation of negligence is thereby admitted, and thereby the company excused. On the trial of the case in the court below a verdict was returned in favor of the defendant in error, upon which judgment was rendered. It appears from the testimony that the animal in question was killed a short distance east of Cedar Creek village, in Cass County; that at the place where the accident occurred the track runs near the Platte river, there being a shallow channel of the river between the south bank and an island on which the plaintiff pastured his cattle. It also appears that it was the duty of the company to fence its track at this point, and that it had constructed a fence on the south side, but none on the north. There is no claim that the defendant's cattle were wilfully on the track, and the proof fails to show neg-

ligence. But, even if negligence was admitted, it would afford no excuse where stock is killed by the cars at a point on a railroad where it is its duty to fence the track, but it fails to do so. The question here presented was before this court in the case of B. & M. R. R. Co. *v.* Brinkman, 14 Neb. 70; s. c. 11 Am. & Eng. R. R. Cas. 438, and it was there held that the liability of the railroad company exists by reason of the statute, without regard to the question of negligence. The statute declares in substance that every railroad corporation whose lines of road, or any part thereof, is open to use, shall, within six months thereafter, erect and maintain fences on the sides of said railroad suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, etc., and declares the penalty for "failing to fence on both sides thereof against all live-stock running at large at all points" that the company "shall be absolutely liable to the owner of any live-stock injured, killed, or destroyed by their agents, employees, or engineers," etc. The statute is plain and unambiguous, and leaves no room for construction. A railroad company failing to fence its track at a point where it is required to fence is liable for stock killed or injured on its track by its engines or cars, and the mere negligence of the owner of the stock is no defence.

The judgment of the court below is clearly right, and is affirmed.

Atchison, Topeka and Santa Fe R. R. Co.

v.

Riggs.

(*Advance Case, Kansas. March* 4, 1884.)

In Kansas, under the Railroad Stock Law of 1874, railroad companies are required to inclose their roads with a good and lawful fence, to prevent animals from going upon their roads, and in counties where the herd-law of 1872 is in force cattle are not allowed to run at large. In a county where both of these laws are in force, an owner of cattle kept and pastured them on his own land, through which a railroad was constructed and operated, which railroad was not inclosed by any fence separating it from the owner's land, and the cattle strayed upon the railroad, where one of them was killed by the railroad company in the operation of its road. *Held*, that the owner of the cattle may recover from the railroad company for such injury.

Where the plaintiff sues a railroad company for negligently permitting fire to escape from one of its engines, whereby forty tons of hay belonging to the plaintiff were destroyed, and the jury find a general verdict in favor of the

plaintiff and against the railroad company, but also find that the engine from which the fire escaped was "of the most approved invention and construction, so far as the appliances for preventing the escape of fire were concerned;" and also find that the engine was "in good condition, so far as all the appliances for preventing the escape of fire were concerned;" and also find that the engineer who managed the engine from which the fire escaped was "a competent, skilful, and careful engineer;" and there was no evidence introduced tending to show that the engineer mismanaged the engine, or that he was negligent in any respect with regard to its management; and the jury do not find that there was any mismanagement or negligence on the part of the engineer; but, in answer to the following question put to the jury, to wit, "How did he so mismanage his engine as to set out the fire?" the jury answer, "We cannot tell;" and, in answer to the further question put to the jury, to wit, "In what does the negligence of the railroad company in permitting the fire to escape from its engine or train consist?" the jury answer, "We cannot tell;" and the court renders judgment upon these special findings in favor of the defendant and against the plaintiff; *held*, that the judgment will not be reversed by the supreme court. A railroad company is not liable for purely accidental fires caused by its engines.

ERROR from Marion County.

For plaintiff in error Geo. R. Peck, A. A. Hurd, W. C. Campbell.

For defendant in error L. F. Keller.

VALENTINE, J.—The Atchison, Topeka, and Santa Fe Railroad Company has filed a petition in error in this court to reverse a judgment of the District Court of Marion County, rendered against the railroad company and in favor of James D. Riggs, and Riggs has filed a cross-petition in error to reverse a judgment rendered by the same court in the same case in favor of the railroad company and against Riggs. Riggs was the plaintiff in the court below, and in his petition below set forth two causes of action: First, a cause of action for causing the death of his cow by the railroad company's failing to fence its road, as required by chapter 94 of the laws of 1874, whereby the cow strayed upon the railroad track, where she was killed through the negligence of the railroad company in operating its road; and second, a cause of action for negligently permitting fire to escape from one of the company's engines, whereby forty tons of hay belonging to the plaintiff were destroyed. The defence was: First, a general denial; second, that the cow was killed at a time when she was running at large, in violation of the county herd-law of 1872, which was then in force in Marion County, where the cow was killed; and third, that the cow was killed on the railroad track where it crosses a public highway. A trial was had before the court and a jury, and the jury rendered a general verdict in favor of the plaintiff and against the defendant on both causes of action, and also made certain special findings of fact; and upon this verdict and these special findings of fact the court below rendered judgment in favor of the plaintiff on the

first cause of action, and in favor of the defendant on the second cause of action; and the defendant, as plaintiff in error, now complains of the judgment rendered on the first cause of action, and the plaintiff below, defendant in error, complains of the judgment rendered on the second cause of action.

As to the first cause of action, it appears from the evidence that during all the time, while the various transactions were occurring out of which the plaintiff's cause of action is supposed to have arisen, the defendant's railroad was located upon and passed through the plaintiff's land, a portion of which road was fenced and a portion was not fenced, though all of it could have been fenced; the plaintiff's cattle were kept and pastured on his own land, from which they strayed through a place where the railroad was not fenced on to the company's premises, where, immediately afterward, the plaintiff's cow was killed by a passing train. It was also admitted that the county herd-law of 1872 (laws of 1872, chap. 93), as well as the railroad stock-law of 1874 (laws of 1874, chap. 94), was in force in Marion County, Kansas, where the cow was killed. These are not all the facts of the case, but these, we think, are all that are necessary to be stated for the purposes of the question which we now propose to discuss. Under these facts, is the railroad company liable? That the railroad company was bound to fence its road, and for its failure to do so is liable for the killing of the plaintiff's cow, there can certainly be no doubt, unless the plaintiff, by his own wrong or negligence, contributed to the injury. See Railroad Stock Law of 1874, and the numerous decisions of this court made under such stock-law. But the railroad company claims that the plaintiff did commit wrong and was guilty of negligence in permitting his cattle to run at large in his own field adjoining the railroad track, in violation of the herd-law of 1872, as the company claims, which precludes, as the company claims, all right on the part of the plaintiff to recover from the railroad company for the killing of his cow. Now, it is not claimed that the plaintiff is precluded from his right to recover merely because his cattle were technically trespassing upon the company's premises, or upon the land from which they strayed when they entered upon the company's premises; for this court has repeatedly decided, that the owner of cattle, not running at large in violation of some positive statute, but rightfully running at large under the statutes, and merely straying from land in which the owner of the cattle had no interest, and upon which the cattle were technically trespassers, to and upon the unfenced premises of a railroad company, in which the cattle had no interest, and upon which the cattle were technically trespassers, might recover from the railroad company for any injuries done by the company to the plaintiff's cattle in the operation of its road. See the numerous decisions made by this court upon this subject. There are also de-

cisions of other courts going even beyond this. Railway Co. v. Howard, decided by the supreme court of Ohio, April 24, 1883, 11 Am. & Eng. R. R. Cas. 488; Toledo, etc., Ry. Co. v. Cary, 37 Ind. 172; Keliher v. Conn. River R. R. Co., 107 Mass. 411; McCall v. Chamberlain, 13 Wis. 637; Dunkirk, etc., R. R. Co. v. Mead, 90 Pa. St. 454; same case, 1 Am. & Eng. R. R. Cas. 166. Besides, in the present case the cattle were not trespassers in any sense upon the land of the plaintiff, from which they strayed upon the premises of the railroad company, and they could hardly be called trespassers upon the premises of the railroad company, for the fee of such premises was in the plaintiff, and not in the railroad company, and he had a right to use such premises under all circumstances, and in any manner he chose, provided his use of the same would not interfere with the rightful and proper use of the same by the railroad company. He would have a right to drive his cattle across the railroad track, from one portion of his land to the other, or even to pasture his cattle upon the railroad track; provided he did not interfere with the rightful use of the premises by the railroad company.

The railroad company claims that the adoption of the herd-law of 1872 in Marion County, where the plaintiff's cow was killed, virtually put the common law in force, and that, under the common law, the owner of cattle must take care of the same, and not permit them to run at large or to trespass upon the property of others. Now, conceding that this is true, and we think it is, we do not think that it will prevent the plaintiff from recovering in the present case. The plaintiff's cow was rightfully upon the plaintiff's own land, and was not trespassing upon the property of any person, and she passed directly from the plaintiff's own land onto the premises occupied by the railroad company—premises to which the plaintiff held the fee-simple title, and in which the railroad company held nothing but an easement—and she was enabled to pass onto such railroad premises wholly from the fault of the railroad company itself in not inclosing its road with a good and sufficient fence, and not from any fault of the plaintiff. Under such circumstances, we think there is no decision in the United States holding that the plaintiff is not entitled to recover; while there are numerous decisions in several of the States, made under similar circumstances, holding that the plaintiff may recover. Shepard v. Buffalo, etc., R. R. Co., 35 N. Y. 641; Ry. Co. v. Howard, just decided by the supreme court of Ohio, April 24, 1883, 11 Am. & Eng. R. R. Cas. 488; Mead v. Burlington, etc., R. R. Co., 52 Vt. 278; s. c., 7 Am. & Eng. R. R. Cas. 550; Wilder v. M. C. R. R. Co., 65 Me. 332; Cleveland, etc., Ry. Co. v. Crossley, 36 Ind. 370; Toledo, etc., R. R. Co. v. Cary, 37 Ind. 172; Cincinnati, etc., R. R. Co. v. Ridge, 54 Ind. 39; Cincinnati, etc., R. R. Co. v. Hildreth, 77 Ind. 504; Rodgers v. Newburyport R. R. Co.,

83 Mass. (1 Allen) 16; Keliher *v.* Conn. River R. R. Co., 107 Mass. 411; Corry *v.* G. W. Ry. Co., 6 R. B. L. R. 237; s. c., 7 Q. B. L. R., 322; s. c., 2 Am. & Eng. R. R. Cas. 612; McCoy *v.* Cal. R. R. Co., 40 Cal. 532; McCall *v.* Chamberlain, 13 Wis. 637; Dunnigan *v.* the C. & N. W. Ry. Co., 18 Wis. 33; Brown *v.* the M., etc., Ry. Co., 21 Wis. 39; Curry *v.* the C. &. N. W. Ry. Co., 43 Wis. 665; Veerhusen *v.* the C. & N. W. Ry. Co., 53 Wis. 689; s. c., 6 Am. & Eng. R. R. Cas. 583; Dunkirk, etc., R. R. Co. *v.* Mead, 90 Pa. St. 454; s. c., 1 Am. & Eng. R. R. Cas. 166; Hinman *v.* Chicago, etc., R. R. Co., 28 1 A. 491; Horn *v.* A. & St. L. R. R. Co., 35 N. H. 169; White *v.* the Concord R. R. Co., 30 N. H. (10 Foster) 188; Keech *v.* the B. & W. Ry. Co., 17 Md. 32.

These cases were decided in States where the common law is in force, except as modified by statutory or constitutional provisions; and in several of such States the common law with reference to fences and stock running at large is in force, except as modified by the particular statutory provision requiring railroad companies to fence their roads. Hence, it would seem that these decisions necessarily have close application to the present case. The railroad company also cites a long list of authorities where it was held that the plaintiff was not entitled to recover under circumstances which, the railroad company claims, are similar to the circumstances in the present case. The principal of such authorities are the following: Jackson *v.* R. & B. R. R. Co., 25 Vt. 150; Bemis *v.* Conn., etc., R. R. Co., 42 Vt. 375; Chapin *v.* the Sullivan R. R. Co., 39 N. H. 53; Giles *v.* B. & M. R. R. Co., 55 N. H. 552; Perkins *v.* Eastern, etc., R. R. Co., 29 Me. 307; Eames *v.* S. & L. R. R. Co., 98 Mass. 560; McDonnell *v.* Pittsburg, etc., R. R. Co., 115 Mass. 564; Darling *v.* Boston & Albany R. R. Co., 121 Mass. 118; Marsh *v.* N. Y., etc., R. R. Co., 14 Barb. 364; Nance *v.* Cayuga, etc., R. R. Co., 26 N. Y. 428; Bennett *v.* Chicago, etc. R. R. Co., 19 Wis. 159; Walsh *v.* the V. and T. R. R. Co., 8 Nev. 110; Pittsburg, etc., R. R. Co. *v.* Methven, 21 O. St. 586; the Peoria, etc., R. R. Co. *v.* Champ, 75 Ill. 578; Ricketts *v.* E. W., etc., R. R. Co., 12 C. B. (Eng.) 160.

It will be seen by an inspection of the foregoing cases that they are not applicable to the present case. The plaintiff's animals in such cases were not only trespassers upon the property of the railroad company, but they were also trespassers upon the property from which they passed when they entered upon the property of the railroad company. In such cases the various animals mentioned were wholly and entirely trespassers; while in the present case they were not trespassers at all, which renders those cases very materially different from the present case. In many of the cases above cited, not only those cited on the part of the plaintiff, but also those cited on the part of the defendant, the courts have held

that the statutes which require railroad companies to fence their roads do so solely for the benefit of adjoining proprietors, and not for the benefit of others, and therefore such courts hold that when animals are rightfully on the premises of adjoining proprietors and escape therefrom on to the premises of a railroad company, because of a want or insufficiency of fences which the railroad company is required by law to build, the railroad company will be held to be liable to the owner of the animals for any injury done by the railroad company to the animals in the operation of its road, although the railroad company may not be guilty of any wrong or negligence except the wrong or negligence of failing to build and maintain a good and sufficient fence. But where the animals are not rightfully on the land of the adjoining proprietors, but are trespassing thereon, and they pass directly from such land on to the property of the railroad company, because of a want or insufficiency of fences which the railroad company is required to build, and the animals become trespassers upon the premises of the railroad company also, such owner cannot recover for any injury done to the animals in the ordinary operation of the railroad, and this for the reason that the plaintiff is as much of a wrongdoer as the defendant. There are other authorities, however, who hold that a railroad company is required to fence its road, not only for the benefit of adjoining proprietors, but also for the benefit of the travelling public; for, as they hold, if the railroad company fence its road so that animals cannot enter upon its property, it thereby makes travel and transportation much safer upon its road than the same otherwise would or could be; and therefore in some of such cases it is held that the railroad company must pay all damages for any animal injured because of a want of a good and sufficient fence, which the railroad company is required to build, although the owner of the animal may be equally as guilty of wrongdoing as the railroad company, and although the animal may have been a trespasser not only upon the property of the railroad company, but also upon the property from which it passed when it entered upon the property of the railroad company. The Toledo, etc., R. R. Co. *v.* Cary, 37 Ind. 172; McCall *v.* Chamberlain, 13 Wis. 637.

These authorities probably go a little too far. We suppose that the statutes of Kansas requiring railroad companies to fence their roads were enacted for the benefit of all persons who may possibly be benefited by them, including the adjoining proprietors and all persons who may legally allow their stock to run at large, and also the travelling public.

Counsel for the railroad company also cite the following decisions of this court as tending to show that in herd-law counties cattle are wrongfully "running at large" even where they are kept on the owner's own land, unless they are so confined that they can-

not pass from the owner's land on to the right of way of the railroad company, and that in all cases where the owner's cattle escape from his own land, because of a want of sufficient fences, he cannot recover. C. B. R. R. Co. *v.* Lea, 20 Kan. 353; K. P. Ry. Co. *v.* Landis, 24 Kan. 406; U. P. Ry. Co. *v.* Dyche, 28 Kan. 200; St. L. & S. F. Ry. Co. *v.* Mossman, 30 Kan. 336.

Now, we do not think that these decisions control the present case, whatever may have been said in any one of the opinions therein delivered.

In the first case, the animal was running at large in the night time in violation of the night herd-law of 1868, as well as in violation of the county herd-law of 1872; and the animal did not pass directly from its owner's premises on to the premises of the railroad company, but was a trespasser before it passed on to the railroad company's premises, as well as afterward. And the language of these two herd-laws is different. In the night herd-law of 1868, the owner of domestic animals is required to "keep them confined," while under the provisions of the county herd-law of 1872 the animals are not allowed to "run at large."

In the second and third cases, the animals were running at large in violation of the night herd-law of 1868, and not in violation of the county herd-law of 1872.

In the fourth case, the question as to the force or effect of any herd-law was really not decided. In the fourth case, the only question really decided was that the signatures to a petition for a county herd-law presented to, and acted upon favorably by the board of county commissioners will afterward be presumed to be the genuine signatures of legal voters of the county. This was really the only question presented to the court by counsel, or decided by the court; although other questions may have been in the case. We think we may consider the question presented to us in the present case as being really a new question and presented to us for the first time in this case; and being thus presented to us for the first time in this case, we decide the question as above indicated. Any other decision would work great hardship to the owners of land in herd-law counties. The railroad companies might with impunity refuse to fence their roads, as required by law; for whenever sued for stock killed by them, they would say to the plaintiff, "You were equally guilty of wrong-doing, and, therefore, you cannot recover." And they would thereby defeat the plaintiff's action. Under such circumstances, the owners of land in herd-law counties would be obliged to build all partition fences between themselves and the right of way occupied by railroad companies, or be deprived of the use of their lands for keeping or pasturing stock thereon. In the present case, the plaintiff was at the time of the injury pasturing his cattle on corn-stalks in his own field; which if the railroad company's theory of the law is correct, he could not

have done with any degree of safety without first building a fence between that portion of his land occupied by himself and that portion thereof occupied by the railroad company as a right of way. If the theory of the railroad company is correct, the owner of lands in a herd-law county would have to abandon the use of his stalk-fields, his stubble-fields, his grass-lands, his woods, and all other lands which he wished to use merely for the purposes of pasture, unless he first built at his own expense sufficient fences, between the land occupied by himself and that occupied by the railroad company, to prevent his stock from passing onto the right of way of the railroad company. This would be a great hardship to all such persons, and might result in great loss.

We think the plaintiff is entitled to recover in this action. His cattle were confined and not permitted to run at large, as to all persons except the railroad company; and if the railroad company had done its duty, they would have been confined and not been permitted to run at large as to any person, not even as to the railroad company. And can the railroad company be permitted to plead its own failures, and take advantage of its own wrong, by setting up as a defence that the plaintiff's cattle were running at large, in his own field without any sufficient fence between the plaintiff's premises and the land occupied by the railroad company? If the plaintiff's cattle were running at large at all, they were doing so merely because of the fault of the railroad company in not building a fence. We do not think they were running at large within the meaning of the herd-law; and as the railroad company was the only party in fault it certainly had no right to claim that they were running at large at all. We think the plaintiff may recover.

Of course, where a railroad company incloses its road with a good and sufficient fence, and afterward, some breachy animal breaks through or over such fence, and enters upon the company's premises, the company will not be liable for any accidental injury done to the animal, although the animal may have passed directly from its owner's premises onto the railroad company's premises. Hance *v.* Cayuga, etc., Ry. Co., 26 N. Y. 428; Fisher *v.* The Farmers' Loan and Trust Co., 21 Wis. 73. And, also, if the owner of the animal should negligently permit the same to enter upon the railroad company's track at or about the time when a train was passing, and the animal should thereby be injured, the owner could not recover. And although the owner of live-stock may permit the same to pasture on his land in the vicinity of a railroad track, and although the railroad company may be in fault in not building a fence, yet the owner must use reasonable and ordinary care and diligence for the safety and protection of his stock, or he cannot recover. This leads us to the question whether the plaintiff was guilty of any culpable negligence or not, independent of the herd-

law. It seems from the evidence that at the time the cow was killed the plaintiff's cattle were kept and pastured on his own land, in charge of a son of the plaintiff and a hired man who were chopping wood about forty rods distant. When the son and hired man heard the train coming, they started to find the cattle, but, before they reached the place where the cattle were then situated, the train had passed and the cow was killed. At this time, there was a very severe snow storm, and the cattle, in order to find shelter had passed from the plaintiff's premises onto the railroad track; and the storm was so severe, and the window of the engineer's cab was so covered with ice and snow, that he could not see ahead of the train more than about four hundred feet and he did not see the cattle until he was so near to them that he could not stop the train and thereby avoid the injury. Under the evidence, we would think that neither the plaintiff nor the defendant was guilty of any culpable negligence independent of the herd-law and stock-law. Evidently, under the verdict and findings of the jury, the plaintiff was not guilty of any culpable contributory negligence. There was also some evidence tending to show that the plaintiff had waived the building of a fence at the place where the cattle passed from the plaintiff's premises onto the railroad track; but whether the plaintiff did waive the building of such fence, or not, we think was fairly submitted to the jury, and the jury found in favor of the plaintiff and against the defendant; and we think the verdict and findings of the jury upon this question are also correct.

This we think disposes of the first cause of action, and we shall now proceed to consider the second cause of action.

The second cause of action, as before stated, was for negligently permitting fire to escape from one of the company's engines, whereby forty tons of hay belonging to the plaintiff were destroyed. Now, while the jury found a general verdict in favor of the plaintiff and against the defendant, yet the jury also found that the engine from which the fire escaped was "of the most approved invention and construction, so far as the appliances for preventing the escape of fire were concerned;" and also found that the engine was "in good condition, so far as all the appliances for preventing the escape of fire were concerned;" and also found that the engineer who managed the engine from which the fire is claimed to have escaped was "a competent, skilful and careful engineer." There was no evidence introduced tending to show that the engineer mismanaged the engine, or that he was negligent in any respect with regard to its management; and the jury did not find that there was any mismanagement or negligence on the part of the engineer; but in answer to the following question put to the jury, to wit, "How did he so mismanage his engine as to set out the fire?" the jury answered "we cannot tell." And, in answer to the further question put to the jury, to wit, "In what does the negligence of the

railroad company in permitting the fire to escape from its engine or train consist?" the jury answered "we cannot tell." Under the findings of the jury and the evidence, we must, therefore, consider that the engine was complete and perfect in every respect, so far as the appliances for preventing the escape of fire were concerned, and that the engineer was a competent, skilful and careful engineer, and that there was nothing in the case tending to show that he was negligent in the management of his engine; and we cannot imagine where there could be any other room for negligence on the part of the railroad company in permitting the fire to escape which is supposed to have caused the injury. And hence, we think the court below did not err in rendering judgment in favor of the railroad company and against the plaintiff on the special findings of the jury; or at least as all presumptions are in favor of the correctness of the decision of the court below, we cannot say, merely because the jury found a general verdict in favor of the plaintiff and against the defendant, that the court below erred in rendering the judgment which it did render. As frequently decided in this court, railroad companies are not insurers against fire, but are liable only for negligence; and if they are guilty of no negligence, then no action can be maintained against them for any accidental fire caused by the escape of fire from their engines. In the present case, under the evidence and the special findings of the jury, it must be held that the fire which destroyed the plaintiff's hay was purely an accidental fire, and was not caused by the negligence of any person.

The judgment of the court below will be affirmed.

Contributory Negligence.—As to the contributory negligence of a party pasturing his cattle in an open field when he knows that a railroad company has failed to perform its statutory duty of constructing and maintaining a sufficient fence, see Cressly v. Northern R. R. Co., and note, infra.

Fires.—A full review of the authorities as to the law of fires kindled by sparks from railroad engines will be found in the note to Brown v. Atlanta, etc., Air Line R. Co., 13 Am. & Eng. R. R. Cas. 479.

CRESSLY

v.

NORTHERN RAILROAD CORPORATION.

(*Advance Case, New Hampshire. June,* 1880.)

Where, by reason of the failure of a railroad company to fence its land as required by statute, animals grazing on adjoining lands are killed, the railroad company is not exempt from liability by reason of the fact that the

owner of the cattle knew of the company's negligence when he turned them out to graze.

CASE for killing the plaintiff's mare, through the neglect of the defendants to maintain a sufficient fence between their railroad and the highway. The plaintiff, knowing the want of a fence, turned his mare into the highway to feed, and she wandered at large and unattended in the highway within the limits of the plaintiff's farm and upon the railroad, and was overtaken by the defendants' cars and killed.

Verdict for the defendants, and motion for a new trial.

Hawthorne & Davis for plaintiff.

Mugridge for defendant.

STANLEY, J.—The plaintiff's mare was grazing upon his land. It is not material that it was on land in which the public had an easement, since her grazing did not interfere with the public rights, and subject to these rights, the plaintiff was entitled to the use of the land within the limits of the highway as fully as to the use of any land he owned. Makepeace *v.* Worden, 1 N. H. 16; Avery *v.* Maxwell, 4 Id. 37; State *v.* New Boston, 11 Id. 407; Baker *v.* Shepard, 24 Id. 208. This case must therefore be decided upon the same principles as if the animal had wandered from the plaintiff's field, through which the railroad was built, and had been killed in consequence of a defect in the fence, which the defendants were bound to maintain. In such cases the law is well settled. Woolson *v.* N. R., 19 N. H. 267; Chapin *v.* Sullivan R., 39 Id. 564; Dean *v.* Sullivan R., 22 Id. 316; Cornwall *v.* Sullivan R., 28 Id. 161; Smith *v.* Eastern R., 35 Id. 356; Towns *v.* Cheshire R., 211 d. 363; Giles *v.* B. & M. R., 55 Id. 552.

Whether the change made by the enactment of the General Statutes, chapter 148, section 1, whereby railroads are, in terms, required to fence on both sides of their road, except at their intersection with highways, has so changed their liabilities that now they are answerable for all damage occasioned by their neglect to perform this duty, whether such damage is to the property of adjoining land-owners or not, we need not now consider, since upon the facts found, we hold that the plaintiff's mare was rightfully in the highway. It may however be suggested that the change to which we have adverted was regarded by the commissioners who revised the General Statutes as material, as is shown by the marginal note of their report. Chap. 149, § 1.

The instructions to the jury made the liability of the defendants depend upon the want of ordinary care by the plaintiff in turning his mare into the highway. This was error. As we have seen, the plaintiff's rights in the highway were the same as in any other land owned by him, except so far as they were modified by the public rights, and in such cases neither his rights nor the de

fendants' liabilities are affected by the plaintiff's want of ordinary care. If the plaintiff had the right to turn his mare into the highway to feed, due care was not required of him to prevent her escape to the defendants' track. The fact that they had neglected to fence their roadway, and the plaintiff's knowledge of that fact, did not deprive him of the rightful use of his land. The defendants' neglect did not impose upon the plaintiff any obligation, or put him under any disability with respect to the reasonable enjoyment of his property. The defendants electing to use their road without complying with the law, which required them to fence it, they assumed the risk of the accident which happened in this case as a consequence of their neglect. It is not a question here whether the plaintiff had an active agency in causing the injury of which he complains. If it were it might be incumbent on him to show that he was in the exercise of ordinary care. Here the question is, whether the plaintiff is to be deprived of a remedy for an injury caused to him while in the ordinary use of his property. By the common law the plaintiff was bound to keep his mare upon his own land; but here the statute imposed that duty upon the defendants, and the rights of the parties are to be determined by the statute. If the plaintiff is held to the same care as the common law requires of him, the statute is inoperative.

In Ohio the law is that where the plaintiff, in the ordinary exercise of his own right, allows his property to be in an exposed or hazardous position, and it becomes injured by the negligence of defendant, he is entitled to damages. By his allowing his property to be exposed to damage he took upon himself the risk of loss or injury by mere accident, but did not thereby voluntarily incur the risk of injury by the negligence of another. Kerwhaker *v.* C. C. & C. R., 3 Ohio St. 172.

In Michigan it is held that the negligence of the plaintiff will not bar his recovery. F. & P. M. R. Co. *v.* Lull, 28 Mich. 510. In that case Cooley, J., says: "Indeed, if contributory negligence could constitute a defence, the purpose of the statute might be in a great measure if not wholly defeated, for the mere neglect of the railway company to observe the directions of the statute would render it unsafe for the owner of beasts to suffer them to be at large, or even on his own ground, in the vicinity of the road, so that if he did what but for the neglect of the company it would be entirely safe and proper for him to do, the very neglect of the company would constitute its protection, since that neglect alone rendered the conduct of the plaintiff negligent."

If the liability of the defendants depends on the exercise of ordinary care by the plaintiff, the defendants need never fence their road so far as respects adjoining owners. The plaintiff could not enjoy the full benefit of his land. He could only make such use of it as would not require it to be inclosed. His use of it would de-

pend on the pleasure of the defendants. It is not contributory negligence, within the meaning of the rule, for the owner to pasture his stock upon his own land because the railroad fails to discharge its statutory duty and fence its road. Shepard *v.* N. Y. & E. R., 35 N. Y. 641.

Whether the defendants would be liable if the plaintiff wilfully drove his mare upon the railroad or drove her and left her in an exposed situation, we need not consider, since the facts stated do not raise such a question. There can however be no doubt of the plaintiff's right to use his land as he pleases, doing no unnecessary injury to others. There was no negligence in his pasturing his mare upon his own premises, although he was aware of the defective condition of the fence, which it was the duty of the defendants to maintain. Corwin *v.* N. Y. & E. R., 13 N. Y. 42, 49, 54; 1 Thomp. Neg. 531; Rogers *v.* Newburyport R., 1 Allen, 16. In Horn *v.* A. & St. L. R., 35 N. H. 169, and Smith *v.* E. R., Id. 356, the defendants were held liable because they had neglected their duty, and the question of contributory negligence was not suggested. In McCoy *v.* Cal. Pac. R., 40 Cal. 532; s. c., 6 Am. Rep. 623, the court says: "Nor was the plaintiff guilty of contributory negligence, from the fact that he knew that the road was not fenced when he turned his stock into the field. The neglect of the defendant to build the fence certainly did not operate to dispossess the plaintiff of his entire field, or what is the same thing, prevent him from making a lawful use of it."

It is no answer to say that the land-owner, if aggrieved by the negligence of the railroad, has a remedy by proper proceedings to compel the building of the fence, or if the road neglect after notice, by building it himself and recovering double the cost from the railroad. Justice does not require that the land-owner shall be compelled, before he can enjoy his property, to discharge a duty which the law places elsewhere, and take the risk of payment, even though he may have double pay.

In Wilder *v.* Maine Cent. R., 65 Me. 332; s. c., 20 Am. Rep. 698, the court says: "The owner of land has a right to use it in the natural and ordinary way for purposes for which it is fit. This right does not depend upon the performance or non-performance of any duty or obligation enjoined by law upon another in respect to his land. He has a right to expect that the requirements of law will be complied with, and to act accordingly. Nor does his knowledge that they have not been affect his right of use one way or the other. If it did the neglect of the other to obey the law might operate to prevent him from the lawful use of his own property."

The true principle applicable to this class of cases is stated in Cook *v.* Champlain Transportation Co., 1 Den. 91, 101. It is this: "While a person confines himself to a lawful employment on his

own premises, his position, however injudicious and imprudent it may be, is not therefore wrongful, and his want of due care or judgment in its selection can never amount to negligence so as thereby to deprive him of redress for wrongs done to him by others." This doctrine was reaffirmed in Fero v. Buffalo & State Line R., 22 N. Y. 209.

Applying this principle here, the plaintiff's use of the highway being rightful, he is entitled to recover for the damages caused to him by the defendants' negligence, regardless of the question whether his knowledge of the defendants' fault made his use of his own land negligent. The first request for instructions embodied this view of the law, and should have been granted.

Verdict set aside.

Contributory Negligence.—The owner of land cannot be deprived of the same for the use of his cattle by reason of the fact that a railroad company has failed to perform its statutory duty of constructing and maintaining fences. He is not, therefore, guilty of contributory negligence in placing his cattle in a field where he knows the fences are not constructed or kept in good repair. Rogers v. Newburyport R. Co., 1 Allen, 16; Shepard v. B. N. Y. & E. R. Co., 35 N. Y. 641; Hammond v. C. & N. W. R. Co., 43 Iowa, 168; McCoy v. California, etc., R. Co., 40 Cal. 532; Wilder v. Maine Central R. R. Co., 65 Me. 332; T. W. & W. R. Co. v. Cary, 39 Ind. 218; C. C. C. & I. R. Co. v. Scudder, 13 Am. & Eng. R. R. Cas. 562; Pittsburg, C. & St. L. R. C. v. Smith, 13 Am. & Eng. R. R. Cas. 579; Watier v. Chicago, M. & St. P. R. Co., 13 Am. & Eng. R. R. Cas. 582; Evans v. St. Paul, etc., R. Co., 13 Am. & Eng. R. R. Cas. 653.

It has been intimated that under certain circumstances such conduct may be contributory negligence for the jury. Poler v. New York, etc., R. Co., 16 N. Y. 476.

The doctrine above laid down is strictly confined to breach of statutory duty on the part of the railroad company to fence. Terry v. New York, etc., R. Co., 22 Barb. 575.

ALABAMA GREAT SOUTHERN R. R. CO.

v.

MCALPINE & CO.

(71 *Alabama Reports*, 545.)

Apart from the influence of any special statute, the law in this State is, that it is not such contributory negligence for the owner of stock to suffer them to run at large, as to prevent him from recovering damages for injuries negligently done to them by persons or corporations owning or controlling railroads.

This rule as to contributory negligence in such cases is not changed by the act of February 28, 1881 (Pamph. Acts, 1880–1, p. 223), making it unlawful for stock to run at large in a designated territory, subjecting the owner to damages committed by such stock to the lands, crops, etc., and declaring the

owner or manager of stock who knowingly suffers them to run at large guilty of a misdemeanor.

The fact that the owner of stock, in allowing them to run at large, is guilty of a violation of a local statute, making it unlawful for stock to run at large within a designated territory, does not preclude him from recovering damages against a railroad company for injuries done to the stock within such territory, while at large, by defendant's train. In such case the plaintiff's unlawful act did not contribute to the injury, and he does not require any aid from it to establish his cause of action.

The law exacts of railroad companies, and other common carriers, in their use of steam-power, extraordinary diligence, or "that degree of diligence which very careful and prudent men take of their own affairs;" and while there are authorities which confine this rule of diligence to the transportation of passengers, such is not the law in this State.

Under the statute (Code of 1876, § 1699), no duty is imposed on the engineer in charge of a locomotive running on a railroad to blow the whistle or ring the bell until the locomotive comes within one fourth of a mile of a road-crossing or regular depot or stopping place; and hence, a charge, given at the request of a plaintiff in an action against a railroad company for damages to stock, which assumes the existence of such duty at a time when the statute does not require its observance, is erroneous.

APPEAL from Greene Circuit Court.

This was an action by J. A. McAlpine & Co. against the Alabama Great Southern R. R. Co., a corporation operating a railroad in this State, to recover damages for injuries alleged to have been done to a mare and mule, the property of the plaintiffs, by the defendant's locomotive and train of cars, through and by reason of negligence and want of care of defendant's agents in the management and running of said locomotive and train. The facts bearing upon the principal question decided are sufficiently stated in the opinion. The evidence introduced on the trial showed that the mare was fatally injured, and the mule killed at different times, and at different places on defendant's track, by being run against and thrown from the track by locomotives attached to defendant's regular passenger trains. The evidence tended to show that the mule was killed by a locomotive attached to a train going north-east, about three hundred and eighty-four yards south-west of Boligee, a regular depot or station on defendant's road at which station or depot a public road crossed defendant's track; that "the signal post at or near which the whistle for the station and crossing is usually blown," was about four hundred and ten yards further south-west, thus making "the signal post" about seven hundred and ninety-four yards from said station and crossing, and that "the engineer, at the usual place for giving the signal for the station, blew one blast for the station, and also, in connection therewith, three blasts for the public road crossing.

The second charge given at the request of the plaintiff, referred to in the opinion, is in these words: "If the jury believe from the evidence that the injury to the mule occurred about 384 yards

south of the regular depot or stopping place at Boligee and the public road crossing at that place, and that the engine or train which committed the injury was going north, and that the whistle was not blown or bell rung for 200 yards or more before the engine or train struck the mule, then such failure to blow the whistle, or ring the bell within the space of 200 yards or more south of where the mule was killed, was, of itself, negligence, and authorizes the jury to find for the plaintiffs so far as the mule is concerned." To the giving of this charge the defendant excepted.

The defendant also reserved an exception to the refusal of the court to give the following charge at its written request: "If the jury believe from the evidence that the defendant was in the possession of the right of way where said mare and mule were killed or injured, and was running its train on its right of way, and that said stock were on defendant's track, and defendant used ordinary care and diligence to prevent the damage complained of, then the plaintiffs cannot recover; and if the evidence satisfies the jury that the speed of the train was checked while approaching the animals the mere fact that the train was not stopped does not tend to show a want of care and prudence." The trial resulted in a verdict and judgment for the plaintiffs, from which the defendant appeals. The charge given and the charge refused, and the rulings on the evidence indicated in the opinion are among the errors here assigned.

T. C. Clarke, J. P. McQueen, and Wood & Wood for appellant.

Head & Butler for appellee.

SOMERVILLE, J.—This action is one for damages, for the alleged negligent injuring of certain stock by the servants of the defendant railroad company. The stock—a mule and a horse—were running at large within that portion of Greene county which is included in the provisions of the act of February 28, 1881, entitled "An Act to prevent the running at large of stock in certain portions of Greene county." This act declares it "unlawful for stock of any kind or description whatever to run at large" within a designated part of the county, and makes the owner liable to the party injured for any damages committed by said stock to any lands, crops, fruit trees, shrubbery, or other property" within the specified district. The owner, or manager of any stock, who knowingly suffers it to run at large, is, furthermore, declared guilty of a misdemeanor.

The principal question for decision is, whether a plaintiff, who suffers his stock to run at large within the prohibition of this act, is debarred from recovering damages for its negligent injury.

Apart from the influence of this special act, the law is unquestioned, that it is not such contributory negligence, in this State, for the owner of stock to suffer it to run at large, as to prevent him from recovering for any damage negligently done to it by persons

or corporations, owning or controlling railroads. Section 1712 of the present Code (1876) expressly declares that, in such cases, "permitting live stock or cattle of any kind to run at large shall not be considered as contributing to such killing or injury." This would no doubt be the law without the statute, upon the ground that the negligence of the owner in such cases is rather the remote than the proximate cause of the injury, and can not, therefore, be regarded as contributory negligence. South & North R. R. Co. *v.* Williams, 65 Ala. 74; Gothard *v.* The Ala. G. S. R. R. Co., 67 Ala. 114.

Does the special act above cited operate to change this principle? This question, in our opinion, is settled in the negative by the case of Jones *v.* The Ala. G. S. R. R. Co., decided at the December term, 1880 [not reported], in which we construed a similar act, approved February 14, 1872 (Acts 1871–72, p. 379), holding that it was confined to the protection of growing crops, and had no reference to the liability of railroad companies." We see no reason for departing from the doctrine of this decision, believing, as we do, that the cases to which we are cited by appellant's counsel, in support of the opposite view, are unsound in their reasoning, as well as repugnant to the rule of contributory negligence declared in such cases by our statute.

It is insisted that the plaintiff was guilty of an unlawful act in suffering his stock to run at large, and that this debars his right of recovery. The rule, however, is, that "to deprive a party of redress because of his own illegal conduct, the illegality must have contributed to the injury." Cooley on Torts, 155. The fact of illegality here renders the act of permitting the stock to run at large neither more nor less contributory to the injury, or proximate as a cause of it. Wharton on Neg. §§ 995, 331. The relation of the act to the injury complained of would be precisely the same, whether it was legal or illegal. It would have no more tendency to produce the injury in the one case than in the other. This is the better and sounder rule recognized in the case of injuries or accidents happening in the violation of Sunday laws. Shearman on Neg. § 39; Whart. on Neg., § 331; Platz *v.* City of Cohoes, 42 Amer. Rep. 286. "The same natural causes," as observed by a learned court, "would have produced the same results on any other day, and the time of the accident or injury, as that it was on Sunday, is wholly immaterial so far as the cause of it, or the question of contributory negligence is concerned." Sutton *v.* Wauwatosa, 29 Wis. 21: Mohney *v.* Cook, 26 Penn. St. 342; Woodman *v.* Hubbard, 25 N. H. 67; Philadelphia, etc., R. R. Co. *v.* Towboat Co., 23 How. (U. S.) 209. "The fact that a party injured," says Mr. Cooley in his works on Torts, "was at the time violating the law, does not put him out of the protection of the

law; he is never put by the law at the mercy of others." Cooley on Torts, 157.

The precise question under consideration has been decided, in accordance with the foregoing views, several times by the Supreme Court of Illinois. C. & St. L. R. R. Co. v. Woosley, 85 Ill. 370; Ewing v. C. & A. R. R. R. Co., 72 Ill. 25, and cases cited.

It is clear that, in all such cases, the plaintiff requires no aid from the illegal part of the transaction in order to establish his cause of action, and this is the test of recovery, both in actions ex delicto and ex contractu. Holt v. Green, 73 Penn. St. 198; s. c., 13 Amer. Rep. 737. He is debarred from recovery only when he cannot prove his cause without being "obliged to lay the foundation of his action in his own violation of the law." Way v. Foster, 1 Allen, 408; Gunter v. Leckey, 30 Ala. 591.

Under these views there was no error in the action of the court excluding the act of February 28, 1881, under consideration, from being given in evidence to the jury, or in the rulings of the court touching its relevancy to the case.

The rule has been frequently declared by this court, in accordance with the generally recognized doctrine that the law exacts of railroad companies, and other common carriers, in their use of steam power, extraordinary diligence, or "that degree of diligence which very careful and prudent men take of their own affairs." M. & M. Ry. Co. v. Blakely, 59 Ala. 471; Cook v. C. R. R. Co., 67 Ala. 533; Tanner v. L. & N. R. R. Co., 60 Ala. 621; Grey's Exr. v. Mobile Trade Co., 55 Ala. 387. There was no error in refusing the charge, requested by the defendant, exculpating the company from liability on the condition of having used only ordinary care and diligence. There are authorities which confine this rule of diligence to the transportation of passengers, but such is not the law in this State.

The court erred, however, in giving charge numbered two requested by the plaintiff. The statute (Code, § 1699,) requires the engineer in control of a locomotive, "to blow the whistle or ring the bell, at least one fourth of a mile before reaching any public road crossing, or any regular depot or stopping place, and to "continue to blow such whistle or ring such bell, at intervals," until he passes such road crossing, or reaches such depot or stopping place. Code, 1876, § 1699. It is plain that no duty is imposed on the engineer to blow the whistle or ring the bell at all, until the locomotive comes within one fourth of a mile, which we judicially know to be four hundred and forty yards, of the road crossing or the depot, as the case may be. Any conformity to the statutory requirement, prior to this time, is entirely optional, and not peremptory. The vice of the charge in question is, that it assumes the existence of the duty at a time when the statute does not require its observance.

The judgment of the Circuit Court must be reversed and the cause remanded.

Contributory Negligence.—As to how far and in what cases allowing animals to stray at large will be deemed contributory negligence, see Alabama Great Southern R. R. Co. *v.* Jones, and note, infra.

Duty with Regard to Signals as to Cattle at Crossings.—The wanton and unnecessary sounding of a whistle at a crossing amounts to negligence. Phila., etc., R. Co. *v.* Stinger, 78 Pa. St. 219; Pennsylvania R. Co. *v.* Barnett, 59 Pa. St. 259. But see Manhattan A. & B. R. Co. *v.* Stewart, 13 Am. & Eng. R. R. Cas. 503.

But a failure to give the signals required by law amounts to negligence, when, if sounded, they would have warned cattle from the track. Taber *v.* Missouri V. R. R. Co., 46 Mo. 354; Owens *v.* Hannibal, etc., R. Co., 58 Mo. 387; Gates *v.* Burlington, etc., R. Co., 39 Iowa, 45; Pennsylvania Co. *v.* Krick, 47 Ind. 369; Illinois, etc., R. Co. *v.* Peyton, 76 Ill. 340; Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375; Lapine *v.* New Orleans, etc., R. Co., 20 La. Ann. 158; Strong *v.* Placerville R. R. Co., 8 Am. & Eng. R. R. Cas. 273; Washington *v.* B. & O. R. R. Co., 10 Am. & Eng. R. R. Cas. 749.

But where it is shown that the giving of signals would not have prevented the injury, evidence is not admissible to show that they were not made. Illinois, etc., R. Co. *v.* Phelps, 29 Ill. 447; Silman, etc., R. Co. *v.* Spencer, 76 Ill. 192; Flattes *v.* Chicago, etc., R. Co., 35 Iowa, 191; Plaster *v.* Illinois, etc., R. Co., 35 Iowa, 449.

Alabama Great Southern R. R. Co.

v.

Jones.

(71 *Alabama Reports*, 487.)

Possession of personal property, carrying with it a presumption of ownership which is not disputable by a trespasser who does not connect himself with the legal title, will support an action in tort for damages done thereto by such trespasser.

In such action, the plaintiff relying on possession for title, the fact that the personal property was in the custody of an overseer or servant of the plaintiff, who did not assert any interest in it, or possession of it, as distinguishable from the plaintiff's possession, does not affect the plaintiff's right to maintain the suit.

While a charge requested, which, without explanation, has a tendency to mislead the jury, by diverting them from the consideration of material evidence, may be refused by the primary court without error, the giving of such a charge is not a reversible error; but, in such case, the party complaining should ask explanatory or additional instructions, to obviate its misleading tendency.

The doctrine of the ancient common law, that the owner of domestic animals must keep them in his close, and cannot, without becoming a trespasser, suffer them to run at large upon the unenclosed lands of others, not being suited to the actual condition of the territory of the State in its early settlement, nor adapted to the general understanding and unvarying custom

and habits of the people, and being irreconcilable with the legislation in reference to estrays, and injuries to, and damages done by such animals, never prevailed in this State; and hence, an owner of such animals cannot be regarded as a trespasser, or as contributing to their injury, if he suffers them to go at large, and they wander upon an unenclosed railroad, and are there injured by a passing train.

A railroad company has the undoubted right to the free, unmolested and exclusive use of its road for the purposes for which it is appropriated; and, if under all the circumstances, ordinary and reasonable care and diligence are exercised to avoid injury to domestic animals found upon the road, the duty to which it is subject is performed; and for injuries which are unavoidable, it cannot be made liable.

Whether ordinary and reasonable care and diligence have been, in a particular case, observed, or omitted, is generally a mixed question of law and fact. When the facts are not disputed, and the deductions or inferences to be drawn from them are indisputable; or when the standard and measure of duty are fixed and defined by law, are the same under all circumstances, the question is for the decision of the court; but if the facts are disputed, or, if not disputed, the existence of negligence is an inference which, as mere matter of discretion and judgment, may or may not be drawn from them, the question must be submitted to the jury.

It is the duty of railroad companies to adopt the best precautions against danger which are in use, and to procure and employ good and safe machinery and appliances, such as are most in use, and approved by the skilful and experienced in the operation of trains, and in the management of railroads; and the omission of this duty is, at least, evidence of negligence.

Hence, in an action against a railroad company for damages done to stock by its train, a charge, given at the plaintiff's request, instructing the jury, in substance, that if they believed from the evidence that, at the time of the accident, it was a starlight night, and the train was running at the rate of twenty-five miles per hour, and could not have been stopped by the use of all proper means, in a less space than one hundred and twenty yards, and that the head-light used on the locomotive only enabled the engineer to see the road about fifty or sixty yards ahead, and the stock so injured were on the track, and could have been seen, had the proper light been provided, and proper vigilance been exercised in time to have prevented the injury, then they would be authorized to find the defendant guilty of negligence,—is free from error.

APPEAL from Greene Circuit Court.

This was an action by Winston Jones against the Alabama Great Southern R. R. Co., a corporation operating a railroad in this State, to recover damages alleged to have been done to designated stock belonging to the plaintiff by the defendant's train, "through and in consequence of the negligence and want of due care and skill of its agents and servants in operating said railroad and running its locomotive and cars over its said railroad." The defendant pleaded (1) the general issue; (2) that at the time the stock were alleged to have been injured, they were not the property of the plaintiff; (3) that at the time of the injury, the plaintiff suffered said stock to go at large in a field not enclosed by a fence, and in which the defendant had a right of way, and to go on defendant's track at a time when defendant's cars were passing over the same; and that by reason thereof, and, without negligence on

defendant's part, its locomotive or cars accidentally, and in the night-time, ran against or over said stock, thereby causing the injury complained of; and that, if any damage was done, it was not by or through the defendant's negligence; and (4) that at the time of the alleged injury, the defendant, a corporation existing under the laws of this State, and being in possession of the right of way over the lands on which the stock were alleged to have been injured, was running by steam power locomotives and cars over their track on this right of way, and the plaintiff suffered said stock to go at large on or near said railroad and on said right of way and track; and that by reason thereof, and a want of care on the part of the plaintiff, and without any fault on the part of the defendant, the locomotive or cars of defendant accidentally ran against or over said stock, and thereby they sustained the alleged injury; and that, if any damage happened to said stock, it was caused by such accident, and not by defendant's fault. The trial was had, as appears from the judgment-entry and bill of exceptions, on issue joined on these pleas, and resulted in a verdict and judgment for the plaintiff.

On the trial the plaintiff examined as a witness one Charles Ellis, "who testified that, being employed by plaintiff, January 1st, 1879, he was the manager on the plantation, near Eutaw, known as the "Jones place," belonging, as witness is informed, to the estate of Joel W. Jones, deceased, in Greene county; and that he made his contract as such manager, and was put in charge of the place and stock by the said Winston Jones, except two of the mules, which he, witness, afterwards bought himself, for, and under instructions from said Winston Jones, and the mare which said Winston Jones afterwards sent to witness from Mobile; and that he received all his orders from him in regard to the management of said place, but he did not know to whom the stock on the said place belonged, or who was the owner thereof; that he had no dealings with any one else except plaintiff, either as to the plantation, stock thereon, or crops raised thereon; that all supplies were furnished by plaintiff, and cotton raised was shipped to him; that, to his knowledge, no one else had any title or ownership in said stock; but that the said Jones had, so far as he knew, the entire control and management of the said plantation, stock, and all the other property belonging thereto." This witness further testified that on Sunday morning, November 14th, 1879, he turned the mules and mare which were killed and injured by defendant's train, out of the lot on the "Jones place." The evidence introduced on behalf of the plaintiff further tended to show that said mules and mare were killed and injured by the passenger train of defendant on the night of November 14th, 1879, on the lands of another, about a mile and a half from the said "Jones place;" and that it was a clear starlight night, and

there was no fog; that "the track of the road at and from the place of collision each way was through an open field, and straight for more than a mile, and that there was no obstruction on either side of the track, near enough to obstruct the view from the approaching train." The value of the stock was also shown.

The evidence introduced on behalf of the defendant tended to show, that the night of November 14th, 1879, when the stock were killed and injured, was dark, cloudy and foggy, it having rained that day; that the train was behind time on account of having a crippled engine; that, at the time the stock were run over or against, the train was on a down grade, in a low, flat place, just after crossing a trestle over a creek, and was not making over schedule time, running about twenty-five miles per hour; that the engineer could not, at that time and place, see more than sixty yards ahead of him on the track, by the head-light, and that a train running at the speed of twenty-five miles per hour could not be stopped by the appliances in use on locomotives and trains in a less space than one hundred and twenty-five yards; that immediately on crossing the trestle, the engineer first discovered the stock coming upon the railroad within thirty-five or forty yards ahead of the engine, when he immediately blew the whistle, applied the brakes (which were air-brakes), and reversed the engine, "all of which was done in an instant of time," but that the train was so near the stock, when he first discovered them, that they were run over or against before he could possibly stop the train; and that the head-light was good, and that the brakes were in good working order. The evidence for the defendant further tended to show, that on the side of the creek where the stock seemed to have come on the railroad, from a little path, "the cottonwood trees and saplings grew very thick to within fifty feet of the track, and that an engineer on a train, coming on the down grade to that point, could not see stock or anything else on that side of the creek, until the engine had crossed the trestle, on account of the cottonwood trees, and chicken corn, which was exceedingly thick at that point," and grew up to within a few yards of the track. There was also evidence tending to show that, at the time of the accident, "the chicken corn was, to a great extent, trampled down by stock feeding thereon, and by wagons hauling out corn, a crop of which was grown on both sides of the railroad, the land being cultivated up to the railroad ditches near the track." The bill of exceptions purports to set out all the testimony, and the substance of the material portions thereof is given above.

The court charged the jury, ex mero motu, "that if they should believe from the evidence, that the plaintiff had the general supervision, control and management of the plantation, stock and all the other property belonging to said plantation, that he employed the overseer and agent, and purchased the stock that

was killed and injured, and that Ellis was his agent, employed by him, and had, at the time said stock was killed and injured, control of the said stock, as the agent of plaintiff, then the plaintiff had such an ownership in said stock, so killed and injured," as would authorize him to bring the suit, and he could recover for any injury the jury believed was done to said stock by the wrongful acts of the defendant, alleged in the complaint. The court also gave, at the written request of the plaintiff, this charge: "If the jury believe from the evidence, that, at the time of the collision, the train was running at about the rate of twenty-five miles per hour, and that the persons running the train, by using all proper means in their power, could not stop the train in a less space than one hundred and twenty yards; that it was on a starlight night, and the light provided by the defendant or its servants only enabled the engineer to see the road about fifty or sixty yards ahead of the engine; and if the jury are satisfied that the stock killed or injured, seven or more in number, were on the track, and could have been seen, had the proper light been provided, and proper vigilance exercised, in time to have prevented the collision, then the jury would be authorized to find the defendant guilty of negligence." To the giving of these charges the defendant duly excepted.

The defendant also reserved an exception to the refusal of the court to give to the jury the following charge at its written request: "If the jury believe from the evidence, that, at the time when said mare and mules were killed and injured, the plaintiff's agent turned them out, with no one to take care of, or look after them, in that portion of the country where there were no fences, and through which the railroad company had its track, on its own right of way, and over which its cars were and had been passing at various times, during the day and night; and the plaintiff's agent left said stock to wander wherever they pleased, this is a violation of the obligation which enjoins care and caution on the part of the plaintiff, and constitutes such negligence on the part of the plaintiff as contributed to the result complained of; and they would be authorized in finding a verdict for the defendant, unless the evidence satisfied them that the servants or employees of the railroad did not use diligence of foresight, due precaution, proper care and diligence to stop said train, so soon as they discovered the stock on or near the track, so as to avoid, if possible, any injury to the same."

The charges given and the charge refused are here assigned as error.

Clark & McQueen for appellant.

Snedecor & Head for appellee.

BRICKELL, C. J.—The general rule is, as is insisted by counsel

for the appellant, that an action for a tort must be prosecuted in the name of the party having the legal interest; and, if it be an injury to property, in the name of the party having the legal title to the property at the time of the injury. 1 Chit. on Pl. 69; Roberts v. Connelly, 14 Ala. 235. We pass over the fact, that of a part of the stock injured the plaintiff had not only possession, but the general, absolute property. Of the others, and of the plantation to which they were attached he had the open, unmolested possession, exercising the dominion of ownership. The bare possession of personal property constitutes a sufficient title to enable the party enjoying it to pursue legal remedies against a mere wrongdoer. In legal contemplation "possession, indeed, may be considered as the primitive proof of title, and the natural foundation of right." Linscott v. Trask, 35 Me. 150. The possessor of personal property is prima facie the owner; and the presumption of ownership arising from it is not disputable by a trespasser, who does not connect himself with the true title.—Cook v. Patterson, 35 Ala. 102; Hare v. Fuller, 7 Ala. 717; Cox v. Easley, 11 Ala. 362. There is no force in the suggestion that Ellis, not the plaintiff, had the possession of the stock. He was the mere overseer or servant of the plaintiff, supervising and managing the plantation under his instructions, not asserting any interest in the property, or possession of it, as distinguishable from the possession of the plaintiff, and incapable of maintaining in his own name any action for an injury to it. Heygood v. State, 59 Ala. 49. We think it indisputable that the plaintiff was entitled to maintain the action.

The instruction given on request of the plaintiff is not drawn very carefully, and, it may be, without explanation, had a tendency to divert the consideration of the jury from material evidence, and to mislead them. If this be true, the Circuit Court could, without error, have refused to have given it; but, having given it, the defendant, to obviate its misleading tendency, should have requested explanatory or additional instructions. And such instructions not having been requested, a reversal of the judgment, because of the tendency of the instruction to mislead, cannot be allowed. As we construe the instruction, it affirms that the jury were authorized, not bound or compelled, to impute negligence to the defendant, if they found from the evidence, that the injury occurred on a clear, star-light night, when the train was running at such a rate of speed, that those having charge of it, by the employment of all the means in their power, could not stop it within the distance that, by the aid of the head-light provided, they could see obstructions on the track, and the injury would have been avoided if a suitable head-light had been provided, and proper diligence exercised. The charge requested by the defendant affirms, that the plaintiff was guilty of contributory negligence in

suffering the stock to run at large near an unenclosed railroad, upon which trains were passing day and night.

The relation, the respective right, duty and liability of the owners of domestic animals, such as horses, mules, cattle, sheep, swine, etc., stock as they are usually termed, suffered to run at large, and a railroad company operating trains upon an unenclosed road, the statutes define and regulate, and have been the subject of numerous judicial decisions. Code of 1876, §§ 1699–1704; N. & C. R. R. Co. *v.* Peacock, 25 Ala. 229; M. & C. R. R. Co. *v.* Bibb, 37 Ala. 699; N. & C. R. R. Co. *v.* Williams, 65 Ala. 74; Jones *v.* Ala. Gt. Sou. R. R. Co. [Not reported.] The doctrine of the ancient common law, that the owner of domestic animals must keep them in his own close, and can not, without becoming a trespasser, suffer them to run at large upon the unenclosed lands of others, never prevailed in this State. There was not probably a principle of the common law so little suited to the actual condition of the territory of the State in its early settlement, and more illy adapted to the general understanding and unvarying habit and custom of the people; and it is not reconcilable with the legislation in reference to estrays, and injuries to, and damages done by wandering domestic animals. This legislation is founded upon the theory of the right of the owner to suffer them to run at large, protection to him in the exercise of the right, and subjection of him to liability for damage done by them only when they break a lawful enclosure. Code of 1876, §§ 1552–97. The owner can not be regarded as a trespasser, or as contributing to their injury, if he suffers them to go at large, and they wander upon an unenclosed railroad. In turning them upon, or suffering them to go upon lands not enclosed, he is in the exercise of a lawful right; and to demand of the company operating trains upon a track not enclosed to prevent them from wandering upon it, ordinary care and diligence to avoid injuries to them, is also his lawful right. The right is the same in character and degree, as his right to exact from any other landed proprietor, whose premises are not enclosed, the same duty, if the animals are found upon such premises. The company has the undoubted right to the free, unmolested, exclusive use of the road, for the purposes to which it is appropriated, and, if under all the circumstances, ordinary and reasonable care and diligence are exercised to avoid injury to animals found upon the road, the duty to which it is subject is performed, and for injuries unavoidable it can not be made liable. Zeigler *v.* S. & N. R. R. Co. 58 Ala. 594.

Whether ordinary and reasonable care and diligence have been in a particular case observed, or whether they have been omitted, is generally a mixed question of law and of fact. When the facts are not disputed, and the deductions or inferences to be drawn from them are indisputable; or, if the standard and measure of

duty are fixed and defined by law, and are the same under all circumstances, the question is for the decision of the court, and not for the verdict of the jury. But if the facts are disputed, or, if not disputed, the existence of negligence is an inference, which, as mere matter of discretion and judgment, may or may not be drawn from them, the question must be submitted to the jury. 2 Thomp. on Negl. 1236–40. In M. & C. R. R. Co. v. Lyon, 62 Ala. 71, we held that it is negligence per se, negligence as a matter of law, for a railroad company to run its train in the night-time, with a head-light not having sufficient capacity to cast light upon the track so that the engineer could perceive obstructions for the distance within which the train could be stopped. It was not intended to assert more than that it is the duty of railroad companies to employ the best machinery and appliances which are in use, and the failure to employ them, in view of the hazardous agencies they control, the dangers necessarily incidental, is a want of the care and diligence a man of ordinary prudence would observe. The omission to provide them is a violation of the duty enjoined by law, and if there be no more in the particular case than the omission and consequent injury, the court may, as matter of law, declare there is actionable negligence. The proposition must, however, be accepted with limitations and qualifications; from unknown causes, the machinery and appliances may, in the course of travel, become defective, or natural causes may intervene which render it inefficient; the train can not be expected to stop on the track. The stoppage may involve more of peril than its continued running as the machinery will permit; and, if under such circumstances, reasonable care and diligence are observed, negligence could not be imputed. If it were true, that from fog, or from driving rains or snow, the light cast from a proper head-light was obscured, the running of the train with reasonable care in view of that circumstance could not be deemed negligent. This, however, is an inquiry the instruction does not involve. The dark, cloudy night, and the dense fog were, as the evidence of the defendant tended to show, the causes obscuring the light, and not any defect in, or insufficiency of the head-light. The instruction proceeds upon the hypothesis that these causes did not exist, that it was a clear, starlight night, a phase of the case shown by the evidence of the plaintiff, and that the head-light was insufficient, and not such a light as the defendant was bound to provide, and the failure to provide a proper light was, under the circumstances, evidence of negligence for the consideration of the jury. The proposition that it is the duty of railroad companies to adopt the best precautions against dangers which are in use, to procure and employ good and safe machinery and appliances, such as are most in use, and approved by the skilful and experienced in the operation of trains and the management of railroads, and the omission

of the duty, to say the least of it, is evidence of negligence, can not be seriously controverted. 1 Thomp. on Negl. 495; F. & B. Turnpike Co. *v.* P. & T. R. R. Co. 54 Penn. St. 345. This is all the instruction, properly construed, can be regarded as asserting.

We find no error in the record prejudicial to the appellant, and the judgment must be affirmed.

Contributory Negligence when Animals Allowed to Stray.—In some States the old common law still remains in force obliging the owner of cattle to prevent them at his peril from straying. If they do stray and get upon a railroad track and are there killed or injured, the owner is in these States held guilty of such contributory negligence as precludes recovery. Price *v.* New Jersey, etc., R. Co., 32 N. J. L. 19; Jackson *v.* Rutland, etc., R. Co., 25 Vt. 150; Eames *v.* Salem, etc., R. Co., 98 Mass. 561; Maynard *v.* Boston, etc., R. Co., 115 Mass. 458; McDonnell *v.* Pittsfield R. Co., 115 Mass. 564; Baltimore, etc., R. Co. *v.* Lamborn, 12 Md. 257; Keech *v.* Baltimore, etc., R. Co., 17 Md. 33; Locke *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 351; Indianapolis, etc., R. Co. *v.* McClure, 26 Ind. 370; Indianapolis, etc., R. Co. *v.* Harter, 38 Ind. 557; Jeffersonville, etc., R. Co. *v.* Underhill, 48 Ind. 389; Cincinnati, etc., R. Co. *v.* Street, 50 Ind. 225; Railroad Co. *v.* Skinner, 19 Pa. St. 298; North Penna. R. R. Co. *v.* Rehman, 49 Pa. St. 101; Drake *v.* Phila., etc., R. Co., 51 Pa. St. 240; Tonawanda, etc., R. Co. *v.* Munger, 5 Denio, 259

Rule how Modified.—In some States a distinction is taken between the case of an owner of cattle who wilfully and knowingly allows them to roam at large and one who uses due care to restrain them notwithstanding which they escape. The former is deemed guilty of contributory negligence which will preclude recovery. The latter is not. Toledo, etc., R. Co. *v.* Johnston, 74 Ill. 83; Ohio, etc., R. Co. *v.* Fowler, 85 Ill. 21; Cairo, etc., R. Co. *v.* Woolsey, 85 Ill. 370; Stucke *v.* Milwaukee, etc., R. Co., 9 Wisc. 203; Chicago, etc., R. Co. *v.* Goss, 17 Wisc. 428; McCandless *v.* Chicago, etc., R. Co., 45 Wisc. 365; Lande *v.* Chicago, etc., R. Co., 33 Wisc. 640; Curry *v.* Chicago, etc., R. Co., 43 Wisc. 665; Estes *v.* Atlantic, etc., R. Co., 63 Me. 208; Towne *v.* Nashua, etc., R. Co., 124 Mass. 101; Isabel *v.* New York, etc., R. Co., 27 Conn. 393; Bulkley *v.* New York, etc., R. Co., 27 Conn. 479; Pacific R. Co. *v.* Brown, 14 Kans. 469; Washington *v.* B. & O. R. R. Co., 10 Am. & Eng. R. R. Cas. 749; Railway Co. *v.* Howard, 11 Am. & Eng. R. R. Cas. 488.

Animals may Stray in Unenclosed Lands.—In the least settled States where there are large amounts of unenclosed land, the law is well settled that it is not contributory negligence to allow cattle to roam upon such lands. Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 157; Memphis, etc., R. Co. *v.* Blakeney, 43 Miss. 218; Raiford *v.* Mississippi, etc., R. Co., 43 Miss. 233; New Orleans, etc., R. Co. *v.* Field, 46 Miss. 573; Mobile, etc., R. Co. *v.* Hudson, 50 Miss. 572; Gorman *v.* Pacific R. R., 26 Mo. 442; McPheeters *v.* Hannibal, etc., R. Co., 45 Mo. 23; Hannibal, etc., R. Co. *v.* Kenney, 41 Mo. 271; Tarwater *v.* Hannibal, etc., R. Co., 42 Mo. 193; Alger *v.* Mississippi, etc., R. Co., 10 Iowa, 268; Murray *v.* S. C. R. Co., 10 Rich. L. 227; Mobile, etc., R. Co. *v.* Williams, 53 Ala. 595; Kerwhacker *v.* Cleveland, C. & C. R. Co., 3 Ohio St. 172; Cleveland, etc., R. Co. *v.* Elliott, 4 Ohio St. 474; Central Ohio R. Co. *v.* Lawrence, 13 Ohio St. 67; Marietta, etc., R. Co. *v.* Stephenson, 24 Ohio St. 48; Macon, etc., R. Co. *v.* Baber, 42 Ga. 301; Williams *v.* Northern Pac. R. Co., 11 Am. & Eng. R. R. Cas. 421; Little Rock & Ft. S. R. Co. *v.* Finley, 11 Am. & Eng. R. R. Cas. 469; Western Md. R. R. Co. *v.* Carter, 13 Am. & Eng. R. R. Cas. 573.

Measure of Duty on Part of Railroad Company to Animals Straying.—In the States where the last-mentioned doctrine prevails railroad companies

are liable for ordinary negligence resulting in the injury to or killing of animals. Gorman v. Pacific R. R. Co., 26 Mo. 442; New Orleans, etc., R. Co. v. Field, 46 Miss. 574; Vicksburg, etc., R. Co. v. Patton, 31 Miss. 157; Alger v. Mississippi, etc., R. Co., 10 Iowa, 268; Macon, etc., R. Co. v. Baber, 42 Ga. 300; Western Md. R. R. Co. v. Carter, 13 Am. & Eng. R. R. Cas. 573. In the absence of proof to the contrary, the presumption is that all due care is taken. Memphis, etc., R. Co. v. Blakeney, 43 Miss. 218 Raiford v. Mississippi, etc., R. Co., 43 Miss. 233; New Orleans, etc., R. Co. v. Field, 46 Miss. 574; Macon, etc., R. Co. v. Davis, 18 Ga. 680; Central, etc., R. Co. v. Davis, 19 Ga. 437.

WABASH, ST. LOUIS AND PACIFIC RY. CO.

v.

ROOKER ET AL.

(90 *Indiana Reports*, 581.)

That a paragraph of complaint contains more than one cause of action, justifies a motion to require them to be stated separately; but to overrule the motion is not available error.

A paragraph of complaint against a railroad company for killing stock, contained two causes of action, of one of which the court had no jurisdiction.

***Held*, that a demurrer, for want of facts, did not reach the defect.**

***Held*, also, that evidence in support of the cause of action of which the court had no jurisdiction should have been excluded on objection.**

A complaint under the statute against a railroad company for killing stock, which avers that the act was done by "the defendant, or some lessee thereof, or other person unknown to the plaintiff," is bad on demurrer.

FROM the Hamilton Circuit Court.

N. O. ROSS and G. E. ROSS for appellant.

T. J. Kane and T. P. Davis for appellees.

MORRIS, C.—The appellees sued the appellant to recover damages for two horses claimed to have been injured, and eight sheep alleged to have been killed, by the locomotives and cars of the appellant, in Hamilton county, at a point on its road where it was not securely fenced. The complaint contains two paragraphs.

The appellant moved the court to require the appellees to separate the several causes of action contained in the second paragraph of the complaint. The motion was overruled. The appellant demurred to each paragraph of the complaint. The court overruled the demurrers. It then answered by a general denial. The cause was submitted to the court for trial. Finding for the apellees. The appellant moved the court for a new trial. The motion was overruled, and judgment rendered for appellees. The rulings

of the court upon the several motions and demurrers are assigned as errors.

It is alleged in the second paragraph of the complaint, that on the 26th day of March, 1882, eight sheep, the property of the appellees, were killed on the appellant's road by its locomotive and cars, at a point where the road was not securely fenced, etc.; that on the — day of June, 1882, two horses belonging to the appellees were wounded and injured on the appellant's road, etc.; that the animals so killed and injured were of the value of $300. A bill of particulars is filed with this paragraph, in which the value of the sheep is stated to be $25, and the damage on account of the injuries to the horses is stated at $275.

It is clear that this paragraph contains two distinct causes of action. Jeffersonville, etc., R. R. Co. *v.* Brevoort, 30 Ind. 324; Toledo, etc. Ry. Co. *v.* Tilton, 27 Ind. 71. The motion of the appellant to require the appellees to state separately the two causes of action contained in this paragraph should have been sustained. But the error was harmless, and cannot avail the appellant. See section 341, R. S. 1881; Rennick *v.* Chandler, 59 Ind. 354; Coan *v.* Grimes, 63 Ind. 21.

The appellant insists that the demurrer to the second paragraph of the complaint should have been sustained, because two causes of action are joined in that paragraph, as to one of which the court had no jurisdiction. The ground of demurrer stated is the want of sufficient facts to constitute a cause of action. Assuming, as the argument seems to, that the paragraph contains facts sufficient to constitute two distinct causes of action, the demurrer should be overruled, for the obvious reason that the paragraph does contain sufficient facts. We do not think the demurrer raises the question which counsel insist upon. If, as the appellant contends, the court had no jurisdiction of one of the causes of action the ground of demurrer, to raise the question, should have been the want of jurisdiction, or the question might have been raised by objecting to the evidence introduced on the trial in support of the cause of action of which the court had no jurisdiction. Jeffersonville, etc., R. R. Co. *v.* Brevoort, supra.

The appellant further contends that the complaint is fatally defective, because neither paragraph shows that the appellant, its assignee or lessee, or a receiver in possession of the road, or any one else for whose conduct it is responsible, was operating or controlling the locomotive or cars which are alleged to have struck said animals at the time the accident occurred.

After stating that the animals were injured on the appellant's track by a locomotive and cars comprising a freight train, the second paragraph, which is, in this respect, the same in substance as the first, proceeds as follows: "And said locomotive and train of cars, and each of them, were at the time of said respective acci.

dents being run and controlled by said defendant, or some lessee thereof, or other person unknown to the plaintiffs."

There is no direct allegation in either paragraph of the complaint that the lessee, or other person unknown to the appellees, was at the time of said accidents running and operating said road in the name of the appellant, nor in what name it was then run and operated.

Section 4025, R. S. 1881, is as follows: "Any railroad corporation, lessee, assignee, receiver, and other person or corporation, running, controlling, or operating any railroad into or through this State, shall be liable, jointly or severally, for stock killed or injured by the locomotives, cars, or other carriages run on such road, in the name in which the road was run or operated at the time, to the extent and according to the provisions of this act."

It was not the intention of the above section to make railroad companies liable for the acts of parties who, without their authority or consent, take possession of their roads and run and operate them.

In view of the franchises and privileges granted to railroad companies by the State, it is perhaps reasonable and just to hold them responsible for the acts of their lessees, assignees and receivers who are appointed with their implied, if not express, consent, and for the acts of such other parties as may run, operate or control their locomotives, cars, etc., with their consent, either express or implied. But to hold a railroad company liable for the acts of a party unknown to it, a mere trespasser it may be, would be as unjust as it would be unreasonable. Cincinnati, etc., R. R. Co. v. Paskins, 36 Ind. 380.

It is alleged in the complaint that either the appellant, some lessee of its road, or some person unknown to the appellees, ran the locomotives and cars against their property, to their damage. But which of these parties ran the locomotives and cars and did the wrong—whether it was the appellant, the lessee of its road, or the unknown party, is not averred. It follows that there is no allegation in the complaint that the appellant, or any one for whose act it is responsible, did any wrong to the appellees. Such an averment is essential to the appellees' claim. The very essence of their right to recover is, that the appellant, or some one for whose acts it is liable, caused the injury of which they complain. This should have been averred directly and positively.

It is said that the words "or other person unknown," etc., should be regarded as surplusage, and that they might have been stricken out on motion. As well might the court strike out the statement that the locomotive was at the time run by the appellant or by some lessee of the road, leaving the simple allegation that the locomotive was at the time run and controlled by some person unknown. We do not think the phrase "by some person un-

known to the plaintiffs" can be regarded as surplusage. Thus to regard it would be to give an entirely new meaning to the complaint.

We also think that this defect in the complaint can be reached by demurrer. The alternative averments neutralize each other, so that there is, in effect, an absence of any allegation that the appellant had in any way injured the property of the appellees. We think the court erred in overruling the demurrer to the complaint.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at appellees' costs.

TERRE HAUTE AND INDIANAPOLIS R. R. CO.

v.

PENN.

(90 *Indiana Reports*, 284.)

A complaint against a railroad company for killing an animal, which, with the other necessary averments, alleges that the railroad "was not securely fenced," is good, and if the railroad could not properly be fenced at the place, the fact is matter of defence, concerning which the complaint need not make any averment.

FROM the Montgomery Circuit Court.

J. G. Williams for appellant.

A. D. Thomas for appellee.

HAMMOND, J.—The appellee sued the appellant in a complaint of two paragraphs. In the first paragraph appellee claimed damages for the killing of a young mare belonging to him. In the second paragraph he claimed damages for the crippling of the same animal. The death and injury complained of were alleged to have been caused and done by the locomotive and cars running upon a railroad used and operated by the appellant, at a place where "said road was not securely fenced, and there were no sufficient cattle-guards."

Answer, the general denial. Trial by jury; verdict for appellee for $75; motion for a new trial overruled; exceptions; judgment on verdict.

The errors assigned in this court are, that the complaint does not state facts sufficient to constitute a cause of action, and that the court below erred in overruling the appellant's motion for a new trial.

The statutory provisions making railroad corporations, etc.,

liable for stock killed or injured by locomotives, cars and other carriages running on roads controlled or operated by them, do not apply to any railroad "securely fenced in." Section 4031, R. S. 1881. It is urged that each paragraph of the complaint in this case is defective because of the omission of the word "in" after the word "fenced." But, as already decided by this court, the words "not securely fenced" are equivalent to "not securely fenced in." Detroit, etc., R. R. Co. v. Blodgett, 61 Ind. 315.

It is further objected to the complaint that it does not aver that the place in question on the appellant's road was where it was required to fence. This averment was unnecessary. If it was not the duty of the appellant to enclose its road at said place, that was a matter of defence. Jeffersonville, etc., R. R. Co. v. Brevoort, 30 Ind. 324; Jeffersonville, etc., R. R. Co. v. Lyon, 72 Ind. 107; Indianapolis, etc., R. R. Co. v. Lindley, 75 Ind. 426; Louisville, etc., Ry. Co. v. Kious, 82 Ind. 357.

We think the complaint would have been good on demurrer. It is certainly sufficient on objections coming after verdict. The reasons stated in the appellant's motion for a new trial were, that the verdict was contrary to law and not sustained by sufficient evidence, and that the court erred in giving its oral instruction to the jury. No objection to the instructions are suggested in the appellant's brief, nor do we discover any. They were applicable to the evidence, and stated the law correctly.

The appellee's mare died from an injury which the evidence tended to show was received from a moving freight train on the appellant's road. When first seen after the injury, the animal was lying near the track of the appellant's road, about twenty feet west of the crossing of a public highway. There was evidence showing that the mare, with a number of horses, was running on the highway in the direction of the railroad, as the train was approaching and crossing the highway. And there was evidence tending to show that the mare ran against one of the cars as it was crossing the highway, and was thrown or carried in the direction of the place where she was found after the injury. But the evidence also tended to show that there was an opening in the fence next to the railroad, through which the horses, as they approached the passing train, entered, and that the mare received the injury after thus leaving the highway. The evidence tended to show that the opening in the fence was made some time prior to the injury complained of by the appellant's employees, for the purpose of constructing a ditch by the railroad.

Viewing the evidence as it is set out in the bill of exceptions, we cannot say that the trial court erred in overruling the motion for a new trial.

Judgment affirmed, at the appellant's costs.

OTOE COUNTY
v.
BALDWIN.

(111 *United States Reports*, 1.)

Bonds to the amount of $40,000 were issued by the county of Otoe, in the State (then Territory) of Nebraska, to the Council Bluffs and St. Joseph Railroad Co., as a donation to that company to aid in the construction of a railroad in Fremont County, Iowa, to secure to said Otoe County an eastern railroad connection. Nothwithstanding any defects or irregularities in the voting upon or issuing said bonds, they were validated by § 8 of the act of the legislature of the State of Nebraska, passed February 15th, 1869 (Laws of 1869, p. 92), entitled "An Act to enable counties, cities, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in this State, and to legalize bonds already issued for such purpose," taken in connection with another act of said legislature of the same date (Laws of 1869, p. 200.)

The legislature of a State, unless restrained by its organic law, has the right to authorize a municipal corporation to issue bonds in aid of a railroad, and to levy a tax to pay the bonds and the interest on them, with or without a popular vote, and to cure, by a retrospective act, irregularities in the exercise of the power conferred.

The first of said acts of February 15th, 1869, was not in violation of section 19 of Article 2 of the Constitution of Nebraska, of 1867, which provided that "no bill shall contain more than one subject, which shall be clearly expressed in its title."

Where an action of law is tried by the circuit court, without a jury, and the facts on which, on a writ of error, the plaintiff in error seeks to raise a question of law, are not admitted in the pleadings, or specially found by the court, and there is a general finding for the defendant in error on the cause of action which involves such question of law, and there is no exception by the plaintiff in error to any ruling of the court in regard to such question, this court can make no adjudication in regard to it.

ON the 1st of April, 1882, John T. Baldwin brought a suit at law, in the Circuit Court of the United States for the District of Nebraska, against the county of Otoe, in the State of Nebraska, to recover the amount due on sundry coupons cut from bonds issued by that county, the coupons being payable, some January 1st, and others July 1st, in each year, from and including 1870 to and including 1881, and January 1st, 1882. On the 11th of August, 1882, Baldwin brought another suit at law, in the same court, against the same defendant, to recover the amount due on sundry other coupons, cut from bonds issued by that county, the coupons being payable, some January 1st, and others July 1st, in each year, from and including 1878 to and including 1882. The bonds were issued by the county, while Nebraska was a Territory, to the Council Bluffs and St. Joseph R. R. Co., the principal being payable January 1st, 1887, with interest from January 1st, 1867, at the rate of 10 per

cent per annum, payable on July 1st and January 1st, in each year. The amount of the principal of the bonds was $40,000, they bore date November 12th, 1866, and were signed by the chairman of the board of county commissioners, and the treasurer, and attested by the county clerk, and bore the seal of the county, and were payable to the company or its assigns, and each bond was assigned by it, by an assignment under its seal, to the bearer, indorsed on the bond, and dated November 18th, 1869. Each bond contained the following statement:

"This bond is one of a series of one hundred and sixty, of the like tenor and date, one hundred of which are for one hundred dollars, and sixty of which are each for five hundred dollars, in the aggregate amounting to the sum of forty thousand dollars, executed and issued, or to be issued from time to time, as the wants of said county shall require, to pay to the Council Bluffs and St. Joseph R. R. Co., as an appropriation made by said county to said railroad company, to aid in the construction of the railroad of said company, to be located in Freemont County, Iowa, through a point most convenient to Nebraska City. This debt is authorized by a vote of the legal voters of said county of Otoe, taken at an election held under and by virtue of an order of the county commissioners of said county, on the 17th day of March, 1866, in pursuance with the several acts of the legislature of the territory of Nebraska, in such cases made and provided, and a resolution of the board of county commissioners of said county granting such aid."

Nebraska City is in the county of Otoe, on the west bank of the Missouri river. Freemont County, in Iowa, adjoins Otoe County on the east, being separated from it only by the Missouri River. Council Bluffs is in Iowa, on the east bank of the Missouri River, above Fremont County, and 40 to 50 miles above Nebraska City. St. Joseph is in Missouri, on the east bank of the Missouri River, below the other places named.

On the 6th of January, 1860, the legislative assembly of the Territory of Nebraska passed an act (Laws of 1859–60, 6th Session, p. 112) entitled "An Act to authorize Otoe County to subscribe and take stock in any railroad located or to be located in Fremont County in the State of Iowa." This act contained the following provisions:

"That the board of County Commissioners for Otoe County may at any time, by an order of said board, cause an election to be held for the purpose of ascertaining the will of the people of Otoe County, as to the propriety of said county subscribing stock for any amount not exceeding seventy-five thousand dollars, to any railroad company for the purpose of constructing any railroad now, or hereafter, to be located in Fremont County and State of Iowa. § 2. If a majority of the legal voters of said county shall vote in favor of such proposition, then the board of county commissioners of Otoe

County shall issue the bonds of said county for whatever amount of stock it may have been decided upon by such vote, to any such railroad company, which bonds shall not bear any greater interest than ten per cent per annum."

On the 11th of January, 1861, the legislative assembly of the Territory passed an act (Laws of 1860–61, 7th Session, p. 146) entitled "An Act to define the powers and duties of county commissioners and county clerk." This act created in each county a board of county commissioners, consisting of three persons. It also provided as follows:

"§ 24. The said commissioners shall have power to submit to the people of the county, at any regular or special election, the question whether the county will borrow money to aid in the construction of public buildings, the question whether the county will aid or construct any road or bridge, or to submit to the people of the county any question involving an extraordinary outlay of money by the county; and said commissioners may aid any enterprise designed for the benefit of the county as aforesaid, whenever a majority of the people thereof shall be in favor of the proposition as provided in this section. § 25. When county warrants are at a depreciated value, the said commissioners may, in like manner, submit the question whether a tax of a higher rate than that provided by law shall be levied, and in all cases when an additional tax is laid in pursuance of a vote of the people of the county, for the special purpose of repaying borrowed money, or of constructing or ordaining to construct any road or bridge, or for aiding in any enterprise contemplated by the 21st section of this act, such special tax shall be paid in money and in no other manner. § 26. The mode of submitting the questions to the people, contemplated by the last two sections, shall be the following: The whole question including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect, or having operation, if it be of a nature to be set forth, and the penalty of its violation, if there be one, is to be published at least for four weeks in some newspaper published in the county. If there be no such newspaper the publication is to be made by being posted up in at least one of the most public places in each election precinct in the county, and in all cases the notices shall name the time when such question shall be voted upon, and the form in which the question shall be taken, and a copy of the question submitted shall be posted up at each place of voting during the day of election. § 27. When the question submitted involves the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to lay a tax for the payment thereof, in addition to the usual taxes under section sixteen of this act; and no vote adopting the question proposed shall be valid, unless it likewise adopt the amount of tax to be

levied to meet the liability incurred. § 28. The rate of tax levied in pursuance of the last four sections of this act, shall, in no case, exceed more than three mills on the dollar, of the county valuation in one year. When the object is to borrow money to aid in the erection of public buildings, as provided, the rate shall be such as to pay the debt in ten years. When the object is to construct, or aid in constructing, any road or bridge, the annual rate shall not exceed one mill on a dollar of the valuation; and any special tax or taxes levied in pursuance of this act, becoming delinquent, shall draw the same rate of interest as ordinary taxes levied in pursuance of the revenue laws of this Territory. § 29. The said commissioners being satisfied that the above requirements have been substantially complied with, and that a majority of the votes cast are in favor of the proposition submitted, shall cause the same to be entered at large upon the book containing the record of their proceedings; and they shall then have power to levy and collect the special tax in the same mannner that the other county taxes are collected. Propositions thus acted upon cannot be rescinded by the board of county commissioners. § 30. Money raised by the county commissioners in pursuance of the last six sections of this act, is specially appropriated and constituted a fund distinct from all others in the hands of the county treasurer, until the obligation assumed is discharged."

The records of the commissioners of Otoe County, and the records of that county, showed the following facts: The county clerk called a meeting of the commissioners of Otoe County, to be held February 24th, 1866, "to take into consideration the question of submitting to the people of said county the issuance of the bonds of said county, not exceeding $200,000 in amount, to be used in securing to said county an eastern railroad connection." The meeting was held on that day, two commissioners being present, and it was ordered that an election be held on the 17th of March, 1866, in and throughout the county of Otoe, "for the purpose of ascertaining whether the commissioners of Otoe County shall issue bonds, not to exceed $200,000, for the purpose of securing an eastern railroad connection for Nebraska City, N. T." The election was held on the day named, and the vote was 1362 for, and 201 against, "the issuing of $200,000 for the purpose of securing an eastern railroad connection for Nebraska City." On the 9th of November, 1866, the commissioners, three being present, made the following order:

"Ordered, that ($40,000) forty thousand dollars be donated to the Council Bluffs and St. Joseph R. R. Co. provided the said railroad company locate their road within one and a half miles of the Ferry Landing at Nebraska City, N. T., and secure to Nebraska City and to Otoe County an eastern railroad connection on or before the 1st day of September, 1876, by the way of St. Joseph, Mo. The above order was made in conformity of a vote of legal voters

of Otoe County, taken at an election duly held under and by virtue of an order of the county commissioners of said county, on the 17th day of March, 1866, in pursuance of the several acts of the legislature of the Territory of Nebraska, in such cases made and provided."

The bonds were issued and were received by the railroad company, $7000 on the 24th of November, 1866, $20,000 on the 23d of February, 1867, and $13,000 on the 13th of November, 1867. Nebraska became a State on the 1st of March, 1867. 14 Stat. 820.

On the 15th of February, 1869, the legislature of the State passed an act, Laws of 1869, p. 92, entitled "An Act to enable counties, cities, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in this State, and to legalize bonds already issued for such purpose." The first seven sections of this act authorized counties, cities, and precincts in the State to issue bonds to aid in the construction of railroads and other works of internal improvement, and prescribed regulations in respect to the same, embracing the taking of a prior vote of the legal voters of the county, city, or precinct, and the laying of taxes to pay the principal and interest of the bonds. Section 8 was as follows:

"§ 8. All bonds heretofore voted and issued by any county or city in this State to aid in the construction of any railroad or other work of internal improvement, are hereby declared to be legal and valid, and a lien upon all the taxable property in such county or city, notwithstanding any defect or irregularity in the submission of the question to a vote of the people, or in taking the vote, or in the execution of such bonds, and notwithstanding the same may not have been voted upon, executed, or issued in conformity with law, and such bonds shall have the same legal validity and binding force as if they had been legally authorized, voted upon, and executed; Provided, That nothing in this section, nor in this act, shall be so construed as to legalize or in any way sanction any vote of the people of Nemaha County heretofore had, for the purpose of aiding in the construction of any railroad, nor anything done by the county commissioners of said county authorizing said vote, or anything done by them in consequence of such vote."

On the same day the legislature of the State passed another act, Laws of 1869, p. 260, entitled "An Act to authorize the county commissioners of Otoe County to issue the bonds of said county to the amount of $150,000 to the Burlington and Missouri River Railroad, or any other railroad running east from Nebraska City." This act provided as follows:

"Whereas the qualified voters of the county of Otoe and State of Nebraska have heretofore, at an election held for that purpose, authorized the county commissioners of said county to issue the

bonds of said county, in payment of stock, to any railroad in Fremont County, Iowa, that would secure to Nebraska City an eastern railroad connection, to the amount of two hundred thousand dollars, and whereas but forty thousand dollars have been issued: Section 1. Therefore, be it enacted by the Legislature of the State of Nebraska, That said commissioners be, and they are hereby authorized to issue one hundred and fifty thousand dollars of the bonds aforesaid to the Burlington and Missouri River R. R. Co., or any other railroad company that will secure to Nebraska City a direct eastern railroad connection, as a donation to said railroad company, on such terms and conditions as may be imposed by said county commissioners. Sec. 2. Said bonds, when so issued, are hereby declared to be binding obligations on said county, and be governed by the terms and conditions of an act entitled 'An Act to enable counties, cities, and precincts to borrow money or to issue bonds to aid in the construction or completion of works of internal improvement in this State, and to legalize bonds already issued for such purpose,' approved February, A.D. 1869."

After an answer and a reply in each suit the two suits were consolidated. Petitions by which the suits were commenced alleged, in respect to each of the bonds from which the coupons sued on were cut, that it was issued and delivered to the company, and assigned by it in blank, and was sold and delivered by it for value, and has in due course of business come to the plaintiff, "who has become and is the true and lawful owner and holder thereof, together with the coupons thereto annexed, and without any knowledge of any facts, if any there be, affecting its validity;" that, by the second act of February 15th, 1869, above cited (which the petitions call an act of the legislature of the Territory), the Territory recognized the due issue of the bonds; and that said county paid all of the coupons attached to said bonds when the same were issued, except those which matured on and after January 1st, 1870.

The answers denied all the allegations of the petitions except those expressly admitted. They denied that the county issued or delivered the bonds. They admitted that the board of county commissioners issued and delivered the bonds and coupons to the company, but aver that they did so without legal authority; that neither the question of issuing the bonds nor the proposition to lay or levy a tax for the payment of the bonds or coupons was ever submitted to or voted or passed upon by the voters or people of the county; that the bonds were a donation by the commissioners to the company, for which the county received no consideration; that the company was an Iowa corporation, having its road wholly in that State; that it obtained the bonds upon an agreement with the commissioners, with which it did not comply, as to where it would build its road and establish a depot; that the

plaintiff had notice of all said facts when he received the bonds and coupons, and paid no consideration for them; that the Territory of Nebraska did not, by said second act of February 15th, 1869, recognize the due issue of the bonds; and that said act was unconstitutional and void, and was not retrospective or retroactive, and did not pretend to authorize or legalize any bond or bonds made or issued before that act was passed. The answer in the second suit alleged as an additional defence, that the question of issuing the bonds, and the sum to be raised, and the amount of tax, and its rate, was not published before March 17th, 1866, or at any time, in any newspaper published in the county, nor posted up in any election precinct, nor was any question of issuing any bonds to said company ever so published or posted up, and no copy of any question to be submitted and voted on by the people of the county at said election was posted up at any place of voting in the county during the 17th of March, 1866. The replies denied the matters set up in the answers.

A trial by jury having been duly waived in the consolidation action, it was tried before the circuit judge and the district judge.

There was no special finding of facts. The judgment, entered May 19, 1883, stated that "the court finds for the defendant upon all the causes of action pleaded by the plaintiff, upon coupons which were more than five years past due when these actions were brought, and, upon all other causes of action pleaded by the plaintiff in the said two several actions, the court finds for the plaintiff, and assesses his damages at" $19,537.65. The judgment was for the plaintiff for that amount, with costs. In the first suit, the answer set up as a defence to the causes of action on the coupons which were more than five years past due when the suit was brought, the Nebraska statute of limitations.

There was, in the record, a bill of exceptions, which stated that it contains all the evidence offered or given by either party in the trial of the case, but it contained no exception to anything by either party, nor did the record contain any exception to any ruling of the court. The bonds and coupons and the records of the county commissioners were made a part of the bill of exceptions. The rest of the bill consisted of oral testimony.

There was, however, in the record, a certificate signed by the circuit judge and the district judge, and filed the same day the judgment was entered, stating that, in the course of the trial, the following questions arose for determination, that is to say:

"First. Whether the commissioners of the defendant had the power to issue bonds under either of the statutes, copies of which are hereto attached, marked 'A' and 'B,' without first giving four weeks' notice of the election, as provided by section 26 of act marked 'B,' so that the same would be good and valid in the hands of a bona fide holder? Second. If the power to issue bonds

existed under either of said statutes, was it a defence available to the county against a bona fide holder of the bonds in suit, that the election, in pursuance of which they were issued, was for the purpose of determining whether the county should issue its bonds to the amount of $200,000, for the purpose of securing an eastern connection for Nebraska City, when only $40,000 was issued under said vote? Third. The order for the election not providing for the submission of a provision to levy a tax, as required by section 27 of the act marked 'B,' should it be presumed that the proposition to issue the bonds submitted and voted on at an election was not accompanied by a provision to lay the tax as required in said act, and, if such presumption is to be indulged, was the presumed fact a defence available to the county against a bona fide holder of the bonds? Fourth. Was it a defence available to the county against a bona fide holder, that the bonds in suit, after being issued in pursuance of a vote held under one or both of said acts, were donated to the railroad company, provided it were located within one and one half miles of Nebraska City? Fifth. If originally illegal and void, were the bonds validated by the acts, copies of which are hereto attached, marked 'C' and 'D'?" The act marked "A" is the Territorial act of January 6, 1860; the act marked "B" is the Territorial act of January 11, 1861; and the acts marked "C" and "D" are the two State acts of February 15, 1869. The certificate further states that, "the circuit judge being of the opinion that, all of said questions notwithstanding, judgment should be for the plaintiff, and the district judge being of the contrary opinion, it is ordered that judgment be entered for the plaintiff, and the said questions be certified to the supreme court for its consideration and answer, . . . at the request of counsel."

Each party sued out a writ of error to review the judgment.

J. M. Woolworth for Baldwin.

O. P. Mason, I. N. Shambaugh, and J. C. Watson for Otoe County.

Blatchford, J.—After reciting the facts in the foregoing language, continued.

The condition of the record is such, in the absence of an exception by either party to any ruling of the court in the progress of the trial, and of a special finding of the court upon facts, that there is nothing open for our consideration outside of the questions embraced in the certificate of the judges. We accept the certificate as sufficient to warrant an answer to the fifth question, although it does not state, in the terms of § 652 or § 693 of the Revised Statutes, that the judges disagreed upon the points stated in the five questions, or that their opinions were opposed upon such questions, but only that they disagreed

as to whether the judgment should be for the plaintiff or the defendant, notwithstanding all of said questions. Having arrived at the conclusion that the fifth question must be answered in the affirmative, and such result disposing of the writ of error taken by the defendant, we do not deem it necessary to answer the other four questions. The fifth question assumes that the bonds were originally illegal and void, and we so assume, without so deciding, in answering that question.

The question is not an open one, on this record, as to whether the plaintiff is a bona fide owner of the bonds and coupons for value, without knowledge or notice of any facts affecting their validity, as alleged in the petitions and replies and denied in the answers. That issue is found for the plaintiff by the general finding in his favor as to all the causes of action except those on coupons which fell due before July 1, 1877. This general finding has the same effect as the verdict of a jury, and we cannot review it.

It is contended for the defendant that the failure to give the four weeks' notice of the election, as provided by § 26 of the act marked "B," and the failure to include in the vote the question of taxation, as provided by § 27, constituted such a want of power to issue the bonds that the Legislature could not validate their issue.

The Territorial act of January 11th, 1861, the proceedings for the election and its result, and the State act marked "D," were before this court in Railroad Co. *v.* County of Otoe, 16 Wall. 667, at December Term, 1872. After that act was passed, and in September, 1869, the commissioners of Otoe County issued to the Burlington and Missouri River R. R. Co., named in that act, as a donation, the $150,000 of bonds mentioned in it, there having been no vote of the people, other than the one above mentioned, authorizing the issue of the bonds. The bonds and their coupons were transferred for value, and before the maturity of any of the coupons, by that company, to the Chicago, Burlington & Quincy R. R. Co., and it sued the county, on some of the coupons, in the Circuit Court of the United States for the District of Nebraska. Upon the trial of that suit, two questions were certified to this court: 1. Whether the act marked "D," authorizing the county to issue bonds in aid of a railroad outside of the State, conflicted with the Constitution of the State. 2. Whether the county commissioners, under that act, could lawfully issue the bonds without the proposition to vote the bonds for the purpose indicated, and also a tax to pay the same, being or having been submitted to a vote of the people of the county, as provided by the Territorial act of January 11th, 1861. This court held, 1. That the act of February 15th, 1869, authorizing the county of Otoe to issue bonds in aid

of a railroad outside of the State, did not conflict with the Constitution of the State. 2. That it was a valid exercise of legislative authority, to authorize a county to incur indebtedness and impose taxation in aid of railroad companies. 3. That the Legislature could constitutionally authorize a donation of the county bonds to the railroad company. 4. That it could authorize aid to a railroad beyond the limits of the county and outside of the State. 5. That, under said act of February 15th, 1869, the county commissioners could lawfully issue the $150,000 of bonds, without a vote of the people, as provided by the Territorial act of January 11th, 1861, on the proposition to issue them and on the question of taxation to pay them. This court said, by Mr. Justice Strong: "If the Legislature had power to authorize the county officers to extend aid on behalf of the county or State to a railroad company, as we have seen it had, very plainly it could prescribe the mode in which such aid might be extended as well as the terms and conditions of the extension, and it needed no assistance from the popular vote of the municipality. Such a vote could not have enlarged legislative power. But the act of 1869 was an unconditional bestowal of authority upon the county commissioners to issue the bonds to the railroad company. It required no precedent action of the voters of the county. It assumed that their assent had been obtained. That prior to 1869 the sanction of approval by a local popular vote had been required for municipal aid to railroad companies or improvement companies, is quite immaterial. The requisition was but the act of an annual Legislature, which any subsequent Legislature could abrogate or annul."

It cannot be doubted that the two acts of February 15th, 1869, taken together, intended to legalize the $40,000 of bonds issued to the Council Bluffs and St. Joseph R. R. Co. These bonds fall within the description of section 8 of the act marked "C," as bonds theretofore "voted and issued" by the county of Otoe to aid in the construction of a railroad. The vote was a vote of the county to issue $200,000 of bonds "for the purpose of securing an eastern railroad connection for Nebraska City; and the $40,000 of bonds were issued as a donation to said company, to aid it in building a railroad so near to Nebraska City as to secure to that city and to the county of Otoe an eastern railroad connection by the way of St. Joseph. The defects and irregularities alleged in respect to the bonds were defects and irregularities in submitting to a vote of the people of the county the question of issuing the bonds, in regard to the publishing of notice, and in regard to including in the vote the question of taxation. It was alleged that the bonds were not voted upon or issued in conformity with law. The statute enacted that, notwithstanding such defects or irregularities, the bonds should be legal and valid, and should have the same legal validity and binding force as if they had been legally authorized,

voted upon and executed." The act of the same date, marked "D," refers to and identifies sufficiently the election held, and the authority given by the vote to the county commissioners to issue the bonds of the county to the amount of $200,000, "to any railroad in Fremont County, Iowa, that would secure to Nebraska City an eastern railroad connection." It recites the authority as one to issue the bonds "in payment of stock." But the question is one merely of identity, and it is not pretended there was any election in Otoe County to the purport set forth, including the words "in payment of stock," while there was just such an election leaving out those words. The identity is further shown by the words in the act, "and whereas but forty thousand dollars have been issued," and by the authority given to issue $150,000 "of the bonds aforesaid," that is, of the $200,000 of bonds so voted, as a donation to any railroad company that would "secure to Nebraska City a direct eastern railroad connection." It is not pretended that any $40,000 of bonds were issued except those named in the bonds sued on in this suit. Taking the two acts together, the legislature recognized the fact that the voters of Otoe County had voted to issue $200,000 of bonds to secure an eastern railroad connection for Nebraska City in that county; that $40,000 had been issued; and that the defects and irregularities before named were alleged to have occured in respect to the voting upon and issuing the $40,000 of the bonds; and it enacted that those bonds should be legal and valid, and that $150,000 more of the $200,000 should be issued for the same purpose.

The decision by this court in regard to the $150,000 of bonds leaves but little more to say in regard to the $40,000. As the legislature had power to authorize the issue of bonds without any precedent action of the voters of the county, it could validate the issue of bonds by curing and legalizing defects in respect to the voting. The bonds were assigned by the railroad company, and came to the plaintiff after the acts of 1869 were passed, and he became a bona fide holder of them on the faith of those acts. The doctrine is well settled in this court, that the legislature of a State, unless restrained by its organic law, has the right to authorize a municipal corporation to issue bonds in aid of a railroad, and to levy a tax to pay the bonds and the interest on them, with or without a popular vote, and to cure, by a retrospective act, irregularities in the exercise of the power conferred. Thompson *v.* Lee County, 3 Wall. 327; Campbell *v.* City of Kenosha, 5 Id. 194.

Much stress is laid by the defendant on the decision of the Supreme Court of Nebraska in Hamlin *v.* Meadville, 6 Neb. 227, in 1877. That was a suit brought in February, 1871, by an owner of property in Otoe County, to enjoin the county treasurer from collecting a tax levied on his property to pay the interest on these $40,000 of bonds and to have the bonds declared void. A judg-

ment to that effect was rendered and was affirmed by the Supreme Court. The question adjudged in the case was the power conferred on the county commissioners, by the acts of 1860 and 1861, to issue the bonds. It was held that the only authority, if any, given by the vote of the people, was to subscribe for stock in a railroad company. The act marked "C" was not considered. It was held that it was not the purpose of the act marked "D" to legalize the $40,000 of bonds, but only to authorize the issue of the $150,000 of bonds; and that the only subject or object expressed in its title was the issuing of bonds.

The adjudication in Hamlin v. Meadville is not set up as a judgment binding on the plaintiff. Nor can it be. He was no party to it, nor was any holder of the bonds.

It is objected that the act marked "C" is void because section 9 of article 2 of the Constitution of Nebraska of 1867, provided that "no bill shall contain more than one subject, which shall be clearly expressed in its title," and because the act does not comply with those provisions. It is plain, we think, that the bill does not contain more than one subject. That subject is municipal bonds issued or to be issued to aid in making works of internal improvement. There is but one purpose, object, or subject, and that is the aiding of such works by bonds and the status of such bonds. The subject of the act, to authorize future bonds and legalize existing bonds, for such purpose, is clearly expressed in its title.

But it is objected that the title of the act is limited to bonds issued or to be issued to aid works in Nebraska, while the body of the act extends to works anywhere; and that so the subject of the act is not expressed in its title. The first section of the act relates to the future issues of bonds by "any county or city in the State," the seventh section relates to like issues by "any precinct in any organized county of this State," and the eighth section relates to "bonds heretofore voted and issued by any county or city in this State." The railroads and works of internal improvement referred to in the body of the act are not limited to those situated in the State." It would, we think, be a strained construction, to hold that the title of the act is to be so interpreted as to be limited to works situated in the State, when such limitation does not exist in the body of the act, and when the words "in this State," in the title, may fairly be regarded as applicable to the prior words "counties, cities, and precincts," to which words they are applied in the body of the act. This principle of construction is sanctioned by the views expressed in Montclair v. Ramsdell, 107 U. S. 147, and in City of Jonesboro' v. Cairo & St. Louis R. R. Co., 110 U. S. 192. See also Cooley's Constitutional Limitations, 141 et seq. We have not been referred to any decision of the Supreme Court of Nebraska which we regard as in conflict with these views.

The question sought to be raised by the writ of error of the

plaintiff is, that the statute of limitations had not run against the coupons which were more than five years past due when the first suit was commenced, because, under section 17 of the Code of Civil Procedure of Nebraska, the disability of a married woman, from whom the plaintiff purchased the bonds, intervened for a sufficient time between their date and such purchase by him, to prevent what would otherwise be the bar of the statute. Without considering that question, it is sufficient to say, that the facts on which it could be raised are not admitted in the pleadings or specially found by the court, and that the general finding for the defendant on the causes of action on coupons which were more than five years past due when the actions were brought, and the absence of any exception by the plaintiff to any ruling of the court in regard to the question, preclude any adjudication here upon it.

The fifth question certified is answered in the affirmative, and the judgment of the Circuit Court is affirmed.

Ratification by Legislature.—It is clearly competent for the Legislature by appropriate action to conform and ratify a prior unauthorized act of a municipal corporation. Estey *v.* Inhabitants of Westminster, 97 Mass. 324; Wilhelm *v.* Cedar Co., 50 Iowa, 254; Mills *v.* Charlton, 29 Wisc. 400; Att'y Gen'l *v.* Lathrop, 24 Mich. 235; Branham *v.* San Jose, 24 Cal. 585; Winn *v.* Macon, 21 Ga. 275; Campbell *v.* Kenosha, 5 Wall. 194; Quincy *v.* Cooke, 107 U. S. 549; s. c., 12 Am. & Eng. R. R. Cas. 645; City of Jonesboro' *v.* Cairo & St. L. R. Co., 110 U. S. 192; s. c., infra; Read *v.* Plattsmouth, 107 U. S. 568; s. c., 2 Am. & Eng. Corp. Cas. 300.

Northern Bank of Toledo

v.

Porter Township Trustees.

(110 *United States Reports*, 608.)

The act of the legislature of Ohio of March 21, 1850, as amended March 25, 1851, authorized county commissioners to submit to the people at special elections the question whether the county would subscribe to the stock of a railroad company and issue bonds in payment thereof; and if the subscription should not be authorized by the county, then that the question of subscriptions by township trustees might be submitted to the people of the respective townships. *Held*, That until refusal by the counties to subscribe, either by direct vote or by failure within a reasonable time to call an election for the purpose the townships were without legislative authority to subscribe, or to issue township bonds in payment of subscriptions.

A municipal corporation which issues a bond reciting on its face that it is issued in part payment of a subscription to the capital stock of a railroad made by the corporation in pursuance of the several acts of the general assembly of the State and of a vote of the qualified electors of the corporation taken in pursuance thereof, is estopped thereby from denying that an elec-

tion was held, or that it was called and conducted in the mode required by law; but it is not estopped from showing that the corporation was without legislative authority to issue the bonds.

The facts which a municipal corporation, issuing bonds in aid of a railroad, is not permitted, against a bona fide holder, to question, in face of a recital in the bonds of their existence, are those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued. The cases relating to this point examined and reviewed.

THIS was an action to recover principal and interest on bonds issued by the defendant in error (also defendant below), in payment of a subscription to a railroad. The defence of want of legislative authority is set forth in the opinion of the court. Verdict for the defendants. The plaintiffs excepted to the charge, and brought the case here by writ of error.

E. W. Kittredge for plaintiff in error.

W. M. Ramsey for defendant in error.

HARLAN, C. J.—On the 15th day of April, 1861, the commissioners of Delaware County, Ohio, passed an order submitting to the voters of that county, at a special election to be held on the 17th day of June thereafter, a proposition to subscribe the sum of $50,000 to the capital stock of the Springfield and Mansfield R. R. Co., a corporation created under the laws of that State, and whose name was subsequently changed to that of the Springfield, Mount Vernon and Pittsburgh R. R. Co. This proposition was approved by the electors, and subsequently, August 4, 1851, the county commissioners made a subscription of the amount voted, payable in bonds of the county.

On December 6, 1851, the commissioners signed the requisite number of bonds, payable to the railroad company, and deposited them with the auditor for delivery when the road was located and a contract made for its construction through the county. It having been claimed that these bonds were defectively executed, others were signed by the commissioners on the 27th day of December, 1852, to be retained by the auditor until those first signed were returned, which being done that officer was directed to deliver the new bonds to the company or to some person authorized to receive them.

After the vote in favor of a county subscription of $50,000, and two days before the formal subscription in its behalf by the county commissioners, that is, on the 2d day of August, 1851, the trustees of Porter Township, in Delaware county, passed an order submitting to the voters of that township, at a special election to be held on the 30th day of August thereafter, a proposition for a subscription of not exceeding $10,000 and not less than $8000 to the capital stock of the same company, payable in township bonds, upon

the condition that the road should be permanently located and established through that township. The proposition was approved by the voters, and subsequently, on May 6th, 1853, township bonds for the amount voted, with interest coupons attached, were issued. They were made payable to the railroad company or its assignees, and were in the customary form of negotiable municipal bonds. Each one recited that it was "issued in part payment of a subscription of one hundred and sixty shares of $50 each to the capital stock of the said Springfield, Mount Vernon and Pittsburgh R. R. Co., made by the said township of Porter in pursuance of the provisions of the several acts of the general assembly of the State of Ohio and of a vote of the qualified electors of said township of Porter taken in pursuance thereof."

This action involves the liability of the township upon these bonds. The judgment below necessarily proceeds upon the ground that they were void for want of legal authority in the township to issue them. In behalf of the plaintiff in error, the present holder of the bonds, it is claimed that there was statutory authority for their issue, and that, apart from any question of such authority, the township is estopped by their recitals, and by numerous payments of annual interest, from disputing its liability. Whether the township had legal authority to execute them, is the first question to be considered.

By the first section of an act of the general assembly of Ohio, passed February 28th, 1846, it is provided that whatever county commissioners should thereafter be authorized to subscribe to the capital stock of any railroad company incorporated in that State, it shall be their duty "to give at least twenty days' notice . . . to the qualified voters of said county to vote at the next annual election to be held in the several townships . . . in said county for or against the subscription as aforesaid; and if a majority of the electors aforesaid, voting at said election for or against a subscription as aforesaid, shall be in favor of the same, such authorized subscription may be made, but not otherwise." 1 S. & C., note, 275.

By the charter of the Springfield and Mansfield R. R. Co., granted March 21st, 1850, it is provided that "the county commissioners of any county through which said railroad may be located, shall be, and they are thereby, authorized to subscribe to the capital stock of said company any sum not exceeding $50,000," and for the payment thereof power was given to borrow money, lay and collect taxes, etc.; further, that "if the county commissioners of any county through which said road shall pass, shall not be authorized by the vote of said county to subscribe stock to said road, the trustees of any township through which said road may be located shall be, and they are hereby, authorized to subscribe any sum of money not exceeding $50,000 to the capital stock of said company, and provide for the payment of said stock in the same

manner that county commissioners aforesaid are authorized: Provided, That the total amount which may be subscribed to the capital stock of said company by any county, and the townships therein, on the line of said road, shall not exceed $100,000;" still further, that "no subscription shall be made by the county commissioners of any county, or the trustees of any township through which said road may be located, until a vote of the qualified voters of said county or township has been declared in favor of said subscription, in the manner pointed out in the mode of proceeding when county commissioners may be authorized by law to subscribe to the capital stock of railroads, turnpike roads, or other incorporated companies in this State, passed February 28th, 1846." 48 O. L. 294; Act March 21st, 1850, §§ 4, 5, and 6.

But by an act passed March 25th, 1851, county commissioners of the several counties, through or into which the Springfield and Mansfield Railroad shall be located, were authorized to cause the question of subscription provided for in the act of March 21st, 1850, "to be submitted to the qualified voters of their respective counties, at a special election, to be by them called for that purpose, at any time thereafter, having first given twenty days' previous notice;" further, that "if the commissioners of any of the counties aforesaid shall not be authorized by the vote as aforesaid to subscribe to the capital stock of said company on behalf of their respective counties, then and in that case, the question of subscription by township trustees provided for in the same act incorporating said railroad company shall be submitted to the people of the respective townships, at a special election, to be called as provided for in the first section of this act"—such elections to be conducted in all respects in the same manner provided for in the charter of the company, except as modified by the said act of March 25th, 1851.

The authority of Porter Township to issue the bonds in question must be derived from the provisions of these acts of assembly. If not found in them, it must be adjudged that no such authority existed.

The fundamental proposition advanced in behalf of plaintiff is, that immediately upon the passage of the act of March 21st, 1850, Porter Township was vested with power to make a subscription to the stock of the company, that the non-authorization of the commissioners, by a vote of the electors, to make a county subscription, was only a condition precedent to the exercise of that power; consequently, that the township is estopped by the recitals in the bonds, and its acquiescence for a series of years, as evidenced by payments of interest, to rely upon the non-fulfilment of that condition. In this construction of the acts in question we are unable to concur. It is entirely clear, we think, that the township was without power to make a subscription until a time arrived when it

could be properly said that the county, as such, had not been authorized by a vote of the electors to make a subscription. We do not mean to say that the right of townships on the line of the road to make subscriptions could be indefinitely postponed by the mere neglect or failure of the county commissioners to submit the question of subscription to a popular vote. That construction, the Supreme Court of Ohio correctly said in Shoemaker *v.* Goshen Township, 14 Ohio St. at p. 580, "would defeat the manifest intention of the statute, which contemplates and authorizes the submission of the question to townships, when subscription on behalf of the county is refused." Such refusal would undoubtedly exist, whenever the electors upon a submission of the question expressed their disapproval of a county subscription. But within any just interpretation of the words of the statute, the power of townships to act would come into existence, not only by a direct refusal of the commissioners to submit the question of subscription to popular vote, but upon their failure within a reasonable time to call an election for that purpose. Shoemaker *v.* Goshen Township, supra.

The first annual election in townships after the passage of the act of March 21st, 1850—which act, by reference to that of 1846, contemplated that the question of subscription would be determined at an annual election—was on the first Monday in April of that year. No submission, however, of that question could have been ordered for that election, because it occurred within twenty days after the passage of the act of 1850. The short time intervening between those dates prevented the requisite notice being given; consequently, the first annual election in townships in which the county commissioners could, under that act, have taken the sense of the electors, was that fixed by law for the second Tuesday of October, 1850. Did the mere failure to submit the question of a county subscription at the last-named election justify the township in claiming that the commissioners had not been authorized by a vote of the county to make a subscription? Were townships, from and after that date, and solely because of such failure, invested with power to move in the matter of subscriptions to the stock of this company? These questions we deem it unnecessary to determine; for, if answered in the affirmative, it still appears that no such power was in fact exercised by Porter Township prior to the passage of the act of March 25th, 1851; by which act, as correctly adjudged by the Supreme Court of Ohio in Shoemaker *v.* Goshen Township, the former statutes were so far modified as not only to renew the power of the county commissioners to subscribe for the stock of this company, if thereunto authorized by the voters at a special election, but in language more direct and specific than employed in former statutes, to make the authority of townships to subscribe depend upon the county commissioners not having been

authorized to make a county subscription. The general assembly of Ohio, it must be presumed, knew at the passage of the act of March 25th, 1851, what particular counties and townships had then made subscriptions to the stock of this railroad company. That act was passed with reference to the situation as it actually was. When, therefore, upon the basis of non-authorization of the commissioners to make a county subscription, it was provided, in the act of March 25th, 1851, that "then, and in that case" townships might subscribe, it must have been intended that the authority of any township, which had not then acted, to subscribe should exist only where, after the passage of the latter act, a county subscription had been negatived either by a vote of the people or by the refusal or failure of the commissioners within a reasonable time to submit the question to a popular vote. If this be not so, then Porter Township would have been authorized in its discretion to vote on a proposition to subscribe either at the annual election in April, 1851, or at any special election thereafter held, notwithstanding the county may have previously made a subscription. But such we cannot suppose to be a correct interpretation of the statute. Consequently, from and after March 25th, 1851, it was apparent from the terms of the act of that date that Porter Township had no legal authority to make a subscription of stock, except in the contingency—which the township could not control, but of which it and all others were bound to take notice—that the commissioners had not been authorized to subscribe for the county. So far from that contingency ever arising, the commissioners (before the township election was called) had been authorized by popular vote to subscribe, and they did in fact subscribe, the sum of $50,000. It cannot, therefore, be said that the commissioners were not authorized by a vote of the county to subscribe at the time Porter Township voted; consequently, the latter was without legal authority to make a subscription. This conclusion is satisfactory to our minds, and is, besides, sustained by the decision of the Supreme Court of Ohio in Hopple v. Trustees of Brown Township in Delaware County, 13 Ohio St. 311, reaffirmed in Hopple v. Hipple, 33 Ohio St. 116.

It is, however, contended, that by the settled doctrines of this court, the township is estopped by the recitals of the bonds in suit, to make its present defence. The bonds, upon their face, purport to have been issued "in pursuance of the provisions of the several acts of the general assembly of the State of Ohio, and for a vote of the qualified electors in said township of Porter, taken in pursuance thereof." These recitals, counsel argue, import a compliance, in all respects, with the law, and, therefore, the township will not be allowed, against a bona fide holder for value, to say that the circumstances did not exist which authorized it to issue the bonds. It is not to be denied that there are general

expressions in some former opinions which, apart from their special facts, would seem to afford support to this proposition in the general terms in which it is presented. But this court said in Cohens *v.* Virginia, 6 Wheat. 264, and again in Carroll *v.* Lessee of Carroll, 16 How. 275, 287, that it was "a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." An examination of the cases in which those general expressions are found, will show that the court has never intended to adjudge that mere recitals by the officers of a municipal corporation in bonds issued in aid of a railroad corporation precluded an inquiry, even where the rights of a bona fide holder were involved, as to the existence of legislative authority to issue them.

A reference to a few of the adjudged cases will serve to illustrate the rule which has controlled the cases involving the validity of municipal bonds. In Commissioners of Knox County *v.* Aspinwall, 21 How. 539, power was given to county commissioners to subscribe stock to be paid for by county bonds, in aid of a railroad corporation, the power to be exercised if the electors, at an election duly called, should approve the subscription. It was adjudged that as the power existed, and since the statute committed to the board of commissioners the authority to decide whether the election was properly held, and whether the subscription was approved by a majority of the electors, the recital in bonds executed by those commissioners, that they were issued in pursuance of the statute giving the power, estopped the county from alleging or proving, to the prejudice of a bona fide holder, that requisite notices of the election had not been given. In Bissell *v.* City of Jeffersonville, 24 How. 287, the court found that there was power to issue the bonds, and that after they were issued and delivered to the railroad company it was too late, as against a bona fide holder, to call in question the determination of the facts, which the law prescribed as the basis of the exercise of the power granted, and which the city authorities were authorized and required to determine before bonds were issued.

Probably the fullest statement of the settled doctrine of this court is found in Town of Coloma *v.* Eaves, 92 U. S. 484. In that case the authority to make the subscription was made, by the statute, to depend upon the result of the submission of the question to a popular vote, and its approval by a majority of the legal votes cast. But whether the statute in these particulars was complied with, was left to the decision of certain persons who held official relations with the municipality in whose behalf the proposed subscription was to be made. It was in reference

to such a case that the court said: "When legislative authority has been given to a municipality, or to its officers, to subscribe to the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal." This doctrine was reaffirmed in Buchanan v. Litchfield, 102 U. S. 278, and in other cases, and we perceive no just ground to doubt its correctness, or to regard it as now open to question in this court.

But we are of opinion that the rule as thus stated does not support the position which counsel for plaintiff in error take in the present case. The adjudged cases, examined in the light of their special circumstances, show that the facts which a municipal corporation, issuing bonds in aid of the construction of a railroad, was not permitted, against a bona fide holder, to question, in face of a recital in the bonds of their existence, were those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued; not merely for themselves, as the ground of their own action, in issuing the bonds, but, equally, as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it. Such is not the case before us. Had the statutes of Ohio conferred upon a township in Delaware County authority to make a subscription to the stock of this company, upon the approval of the voters at an election previously held, then a recital, by its proper officers, such as is found in the bonds in suit, would have estopped the township from proving that no election was in fact held, or that the election was not called and conducted in the mode prescribed by law; for in such case it would be clear that the law had referred to the officers of the township, not only the ascertainment, but the decision of the facts involved in the mode of exercising the power granted. But in this case, as we have seen, power in townships to subscribe did not come into existence, that is, did not exist, except where the county commissioners had not been authorized to make a subscription. Whether they had not been so authorized, that is, whether the question of subscription had or had not been submitted to a county vote, or whether the county commissioners had failed for so long a time to take the sense of the people as to show that they had not, within

the meaning of the law, been authorized to make a subscription, were matters with which the trustees of the township, in the discharge of their ordinary duties, had no official connection, and which the statute had not committed to their final determination. Granting that the recital in the bonds that they were issued "in pursuance of the provisions of the several acts of the general assembly of Ohio," is equivalent to an express recital that the county commissioners had not been authorized by a vote of the county to subscribe to the stock of this company, and that, consequently, the power conferred upon the township was brought into existence, still it is the recital of a fact arising out of the duties of county officers, and which the purchaser and all others must be presumed to know did not belong to the township to determine, so as to confer or create power which, under the law, did not exist. In the view we have taken of this case, McClure *v.* Township of Oxford, 94 U. S. 429, is instructive. That was a case of municipal subscription to a railroad corporation. The act conferring the authority provided that it should take effect (and, therefore, should not be a law except) from and after its publication in a particular newspaper. Thirty days' notice of the election was required. But the election was held within thirty days from the publication in the paper named in the act. The bonds recited that they were issued in pursuance of the statute, describing it by the date of its passage, not the date of its publication in the newspaper designated. They showed upon their face that the election was held April 8, 1872. But the purchaser was held bound to know that the act was not in fact published in that newspaper until March 21, 1872; that, therefore, it did not become a law until from and after that date. He was, consequently, charged with knowledge that the election was held upon insufficient notice. The bonds were, for these reasons, declared to be not binding upon any township. The publication of the act, plainly, was not a matter with which the township trustees, as such, had any official connection. It was not made their duty to have it published. The time of publication would not necessarily appear upon the township records; but publication in a named newspaper was, as the face of the act showed, vital, not simply to the exercise but to the very existence of the power to subscribe. We may repeat here what was said in Anthony *v.* Jasper County, 101 U. S. 693, 697, that purchasers of municipal bonds "are charged with notice of the laws of the State, granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality the bona fide holder is protected against mere irregularities in the manner of its execution; but if there is a want of power no legal liability can be created." So here, Porter Township is estopped by the recitals in the bonds from saying that no township election was held, or that it was not called and conducted in the particular mode re-

quired by law. But it not estopped to show that it was without legislative authority to order the election of August 30, 1851, and to issue the bonds in suit. The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals; but the power existing, the municipalty may be estopped by recitals to prove irregularities in the exercise of that power; or, when the law prescribes conditions upon the exercise of the power granted, and commits to the officers of such municipality the determination of the question whether those conditions have been performed, the corporation will also be estopped by recitals which import such performance.

The judgment is affirmed.

Effect of Recitals in Municipal Aid Bonds.—The doctrine of the Supreme Court of the United States in regard to the effect of recitals in railroad aid bonds is well established. Where by such recitals the performance of any conditions precedent to the validity of the bond are set forth, the municipality is estopped to deny the truth of such recitals as against a bona fide holder for value. It is not, however, in any case estopped to set up lack of legislative authority to issue the bonds. The following are the leading authorities: Knox Co. *v.* Aspinwall, 21 How. 439; Moran *v.* Miami Co., 2 Black. 722; Supervisors *v.* Schenck, 5 Wall. 772; Rogers *v.* Burlington, 3 Wall. 654; Woods *v.* Lawrence Co., 1 Black. 386; Mercer Co. *v.* Harket, 1 Wall. 83; Meyer *v.* Muscatine, 1 Wall. 385; Bissell *v.* Jeffersonville, 24 How. 287; Gelpcke *v.* Dubuque, 1 Wall. 175; Pendleton Co. *v.* Amy, 18 Wall. 297; St. Joseph Township *v.* Rogers, 16 Wall. 644; Grand Chute *v.* Winegar, 15 Wall. 572; Coloma *v.* Eaves, 92 U. S. 484; Randolph Co. *v.* Post, 93 U. S. 502; Leavenworth Co. *v.* Barnes, 94 U. S. 70; Douglass Co. *v.* Bolles, 94 U. S. 104; Commis. of Johnson Co. *v.* Thayer, 94 U. S. 631; Cass Co. *v.* Johnson, 95 U. S. 360; Daveiss Co. *v.* Hudekoper, 98 U. S. 98; Nauvoo *v.* Ritter, 97 U. S. 389; Venice *v.* Murdock, 92 U. S. 494; Anthony *v.* Gasper Co., 101 U. S. 693; Warren *v.* Marcy, 97 U. S. 96; Harkett *v.* Ottawa, 99 U. S. 66; San Antonio *v.* Mehaffey, 96 U. S. 312; Lyons *v.* Munson, 99 U. S. 684; Supervisors *v.* Galbraith, 99 U. S. 212; Menasha *v.* Hazard, 101 U. S. 126; s. c., 2 Am. & Eng. R. R. Cas. 571; Pompton *v.* Cooper Union, 101 U. S. 196; Douglass *v.* Pike Co., 101 U. S. 677; Darlington *v.* Jackson Co., 101 U. S. 688; Foote *v.* Pike Co., 101 U. S. 688; Roberts *v.* Bolles, 101 U. S. 119; Dodge *v.* Platte Co., 2 Am. & Eng. R. R. Cas. 583; Bonham *v.* Needles, 2 Am. & Eng. R. R. Cas. 642; Walnut *v.* Wade, 3 Am. & Eng. R. R. Cas. 36; Hopper *v.* Covington, 4 Am. & Eng. R. R. Cas. 251; Cagwin *v.* Hancock, 5 Am. & Eng. R. R. Cas. 150; Clay Co. *v.* Society for Savings, 5 Am. & Eng. R. R. Cas. 170; Burr *v.* Charlton Co., 6 Am. & Eng. R. R. Cas. 584; Moultrie Co. *v.* Fairfield, 7 Am. & Eng. R. R. Cas. 194; Pana *v.* Bowler, 12 Am. & Eng. R. R. Cas. 563; American L. I. Co. *v.* Bruce, 12 Am. & Eng. R. R. Cas. 610; Lewis *v.* Commissioners of Barbour Co., 12 Am. & Eng. R. R. Cas. 615. See also the cases infra upon this point next hereinafter reported.

BISSELL

v.

TOWNSHIP OF SPRING VALLEY.

(*Advance Case, Supreme Court of the United States. January* 21, 1884.)

Under the laws of Kansas of 1870, c. 90, authorizing the issue of township bonds, which provides that after the requisite vote in favor of the issue "the board of county commissioners shall order the county clerk to make such subscription in the name of the township, and shall cause such bonds as may be required by the terms of said vote and subscription to be issued in the name of such township, to be signed by the chairman of the board, and attested by the clerk, under the seal of the county," *held*, that the signature of the clerk was essential to the validity of the bonds, even though he had no discretion to withhold it.

A township is not estopped by recitals in instruments purporting to be its bonds, unless they actually are such, and have been duly executed; and an innocent holder for value is in no better position than the obligee.

Under the laws of Kansas of 1872, c. 68, § 15, authorizing the registration of outstanding bonds, wherein it is provided that it shall be the duty of the auditor of State, upon the registration of any such bonds, "within ten days thereafter to notify the officers issuing the same of such registration, which fact shall be entered by such officers in a book wherein the record of such bonds is kept, and such bonds shall thereafter be considered registered bonds," *held*, that no such bonds could be entitled to the benefit of the act unless due compliance with these requisitions were shown.

IN error to the Circuit Court of the United States for the District of Kansas.

Alfred Ennis for plaintiff in error.

W. H. Rossington for defendant in error.

MATTHEWS, J.—This was an action brought by the plaintiff in error to recover the amount of certain interest coupons attached to municipal bonds, which, it is alleged in the petition or complaint, were made, issued, and delivered by the defendant, a municipal corporation of Kansas, to aid in the construction of a railroad running within and through its corporate limits, under and in pursuance of an act of the legislature of the State of Kansas, entitled "An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same," approved February 25, 1870, under and in pursuance of an order of the board of county commissioners of the county of Cherokee, and under and in pursuance of a vote of more than three fifths of the qualified voters of the township, voting at an election duly held therein for such purpose, being negotiable bonds payable to bearer. It is further alleged "that afterwards, to-wit, on Decem-

ber 15, A.D. 1871, each of the said bonds, with all the interest coupons thereto attached, was put upon the market and sold and delivered to bona fide purchasers for value, the same passing from hand to hand like other negotiable securities. That afterwards, to-wit, on April 11, A.D. 1872, each of the said bonds, with all the interest coupons thereto attached, was duly registered in the office of the auditor of the State of Kansas, according to law, and the fact that each of the said bonds was so registered was then and there, under the hand and official seal of the said auditor, in writing duly certified and indorsed upon each of the said bonds, a copy of which said certificate and indorsement is filed herewith, made part hereof, and marked Exhibit B." It is also alleged that after the issuing and delivering of the said bonds, and before the maturity, either of the bonds or of any of the coupons sued upon, they were sold and delivered to the plaintiff for the price of 90 cents on the dollar thereof in cash.

The following is the form of the bond:

"No. ———.) UNITED STATES OF AMERICA. ($1000.

"COUNTY OF CHEROKEE, STATE OF KANSAS.

"Spring Valley Township Bond.

"Know all men by these presents that Spring Valley township, county of Cherokee, State of Kansas, acknowledges itself and is firmly bound to the Atlantic & Pacific R. R. Co. in the sum of one thousand dollars, which sum the said township therein promises to pay to the said Atlantic & Pacific R. R. Co., or bearer, at the office of Northrop & Chick, in the city of New York, and State of New York, on the fifteenth day of December, 1886, together with the interest on the first day of July in each and every year, until this bond matures, at the rate of seven per cent per annum, which interest shall be payable annually on the presentation and delivery at said office of the coupons of interest hereto attached.

"This bond being issued under and pursuant to an order of the board of county commissioners of Cherokee county, in the State of Kansas, by virtue of an act of the legislature of the State of Kansas, approved February 25, 1870, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same;' and authorized by a vote of the people taken on the fourth day of February, 1871, as required by law, upon the proposition to subscribe one hundred and fifty thousand dollars to aid in the construction of the said railroad, which proposition was voted upon on the day aforesaid, and three fifths of the votes of said township being cast in favor of said proposition.

"In testimony whereof the said board of county commissioners of Cherokee county have executed this bond by the chairman of said board, under the order thereof, signing his name hereunto,

and by the clerk of said board attesting the same and affixing the seal of said board.

"This done at Columbus, Cherokee county, this fitteenth day of December, 1871.

"[Seal of Cherokee county, Kansas.] WM. H. CLARK,
"Chairman Board of County Commissioners.

"J. G. DUNLAVY, County Clerk."

The certificate of registration is as follows:

"I, A. Thoman, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued, that the signatures thereto are genuine, and that such bond has been duly registered in my office in accordance with an act of the legislature, entitled 'An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith,' approved March 2, 1872.

"Witness my hand and official seal, this eleventh day of April, 1872.

"[SEAL] A. THOMAN, Auditor of State."

The defendant, in answer to the petition, pleaded the following defence: "That it ought not to be charged with the said supposed debt, by virtue of the said supposed bonds and coupons, because it, by its attorneys, says that J. G. Dunlavy, whose name appears on said bonds and coupons as county clerk, never signed his name thereto or thereon, nor ever authorized any party or parties to sign his name thereto or thereon, and that said signature is not his signature. Nor did he affix or authorize to be affixed the seal of said county of Cherokee to said bonds or coupons."

To this the plaintiff demurred. The demurrer was overruled, and the plaintiff declining to reply, judgment was rendered for the defendant, to review which this writ of error is prosecuted. The assignment of error relied on is that this defence being insufficient in law, the demurrer thereto should have been sustained and judgment rendered for the plaintiff. The plaintiff in error contends that this judgment is erroneous on several grounds, which we proceed to consider in their order.

1. It is claimed, in the first place, that the defence is not sufficient, because the signature of the county clerk is not essential to the validity of the bonds, nor that the county seal should have been affixed thereto by him. The statute of Kansas (Laws Kan. 1870, c. 90, p. 189), under which the bonds in question purport to have been issued, contains the following provisions:

"Section 1. Whenever fifty of the qualified voters, they being

freeholders, of any municipal township in any county in the State, shall petition in writing the board of county commissioners of such county to submit to the qualified voters of such township a proposition to take stock, in the name of such township, in any railroad proposed to be constructed into or through such township, and shall in such petition designate the railroad company and the amount of stock proposed to be taken, and the mode and terms of payment for the same, together with the conditions of such subscription, if any, it shall be the duty of such board of county commissioners to cause an election to be held by the qualified voters of such township, to determine whether such subscription shall be made: provided, that the amount of bonds voted by any township shall not be above such an amount as will require a levy of more than one per cent per annum on the taxable property of such township to pay the yearly interest on the amount of bonds issued.

"Sec. 5. If three fifths of the electors voting at such election vote for the subscription of the stock, the board of county commissioners shall order the county clerk to make such subscription in the name of the township, and shall cause such bonds as may be required by the terms of said vote and subscription to be issued in the name of such township to be signed by the chairman of the board, and attested by the clerk, under the seal of the county: provided, that the commissioners shall not cause such bonds to be issued until the railroad shall have been completed through the township voting such bonds, or to such point in said township as may be conditioned in said bonds."

It is argued, as the board of county commissioners is the prescribed authority which orders every step to be taken to issue the bonds, and as the clerk acts only as directed by it, and signs and seals the bonds merely as a witness of its orders and acts, that it is only what that board does and directs which becomes important, and that if it issues bonds with the name of the clerk signed and the seal of the county attached, it is not material whether the clerk writes his name or affixes the seal, or whether it is done by another. It is alleged in the petition that the defendant corporation, the municipal township, made, issued, and delivered the bonds on which the suit is founded, and that it was done under, and in pursuance of, an order of the board of county commissioners of the county of Cherokee. But it is sufficient to say, that the power of the board of county commissioners to bind the township is conferred by the statute to be exercised only in the mode pointed out, and the attesting signature of the clerk is as material to the integrity and validity of the bonds as is that of the chairman of the board of county commissioners. The township had no power to bind itself for the purpose of aiding in the construction of a railroad, by subscription to its capital stock and the issue of bonds

to pay for the same, except as authorized by this statute; the board of county commissioners of the county did not represent the township for any other purpose, and could not execute its power to issue bonds by instruments not conforming to the substantial requirements of the law. That law required the bonds to be executed in a particular manner, and the signature of the clerk is essential to the valid execution of them, even though he had no discretion to withhold it. Anthony *v.* County of Jasper, 101 U. S. 693–697; McGarrahan *v.* Mining Co., 96 U. S. 316. Admitting that the board could cause his signature to be affixed, without his assent, by another specially or generally appointed to do so; still, that it was so affixed in the present case does not appear as matter of fact, and if the fact could be supplied by supposition, the signature would still, in law, be the signature of the clerk. But the answer denies that fact, and the demurrer admits the truth of the denial. So that the defence set forth in the answer is, in law, that the bonds sued on are not the bonds of the township, and that is admitted by the demurrer to be true.

2. This disposes of the second ground of the contention of the plaintiff in error, which is that the township defendant is estopped by the bonds, and the recitals contained in them, to dispute their validity. But there can be no ground for such an estoppel, unless the bonds, which are supposed to affect it, are the bonds of the defendant. We have just seen that, by the pleadings, they are admitted not to be such; and the position of the plaintiff in error is not improved by the supposition that he is an innocent holder for value. If the bonds are not the act and deed of the defendant, they do not bind it at all, and cannot be made obligatory by their own contents.

3. It is argued, however, finally, that the defendant township is estopped to dispute the validity and obligation of these bonds by the fact and certificate of registration. The statute of Kansas (Laws Kan, 1872, c. 68, p. 110), to authorize counties, etc., to issue bonds, and providing for their registration, etc., contained ample and specific provisions, according to which municipal corporations were authorized to lend their credit to aid in the construction of works of internal improvement. It required that when bonds were to be issued for such purpose, the officers of the municipal body making them, should deliver them in the first instance to the treasurer of the State, to be held by him in escrow, or to an agent agreed on, until full compliance with the conditions of the agreement on which they were to issue, when the treasurer or agent was required to deliver them to the parties entitled to them. The officers of the municipal corporation were also required to make registration thereof, in a book kept for that purpose, and to certify a statement of the same to the auditor of the State; and, if within 30 days after their issue the holder of such bonds should present

them to the auditor of State for registration, he was required, upon being satisfied that such bonds had been issued according to the act, and that the signatures thereto of the officers signing the the same were genuine, to register the same in his office, in a book kept for that purpose, in the same manner that such bonds were required to be registered by the officers issuing the same, and, also, to certify upon such bonds the fact that they had been regularly and legally issued, that the signatures thereto were genuine, and that such bonds had been registered in his office according to law. The act also makes provision for the registration of bonds not issued under it, but issued either before its enactment or in pursuance of agreements entered into before it took effect. The fifteenth section is as follows:

"Sec. 15. That the holder of bonds heretofore issued, or that may hereafter be issued, in pursuance of any contract heretofore made under any law of this State, may have the benefits of this act by having such bonds registered in the office of said auditor of State as provided herein for the registration of bonds (issued) by virtue hereof. It shall be the duty of the auditor of State, upon the registration of any bonds not issued under the provisions of this act, within ten days thereafter, to notify the officers issuing the same of such registration, which fact shall be entered by such officers in a book wherein the record of such bonds is kept, and such bonds shall thereafter be considered registered bonds."

Under this section it is claimed that the bonds sued on were registered, having been issued prior to the passage of the registration act of 1872; and it is insisted, upon the authority of the case of Lewis v. Com'rs Barbour Co., 105 U. S. 739; s. c., 12 Am. & Eng. R. R. Cas. 615, that the registration is conclusive of their validity, as against the defence made in the answer. It is shown, however, by a comparison of the fifteenth section with the other sections of the act in reference to registration, that distinct and diverse provisions are made for different classes of bonds,—those issued under the act and those previously issued or agreed to be issued under prior acts. As to the former class, the bonds authorized are to be registered, in the first instance, according to the mandate of the twelfth section, by the officers of the municipality acting in that behalf, who are required to transmit to the auditor of State a certified statement of the number, amount, and character of the bonds so issued, to whom issued, and for what purpose, which statement is required to be attested by the clerk of the municipal corporation issuing the same under its corporate seal. The registration thus provided for consists of two parts,—that which is recorded by the officers of the corporation in their books, and that which the auditor records in his own,—and in that case the last step is taken by the auditor, who certifies it on the bonds themselves, presented by the holder for that purpose. This certificate is intended to be

based not merely upon what the auditor himself has done, but upon the knowledge officially certified to him of what had previously been done by the officers of the municipal corporation issuing the bonds. But as to the other class of bonds, those not issued under the act of 1872, the order of the steps in registration is reversed. The first record is made by the auditor on presentation of the bonds by the holder for that purpose. Within ten days thereafter he is required by the fifteenth section of the act to notify the officers issuing the same of such registration by him, which fact, it is provided, shall be entered by such officers in a book wherein the record of such bonds is kept, and such bonds, the statute then proceeds to declare, shall thereafter be considered registered bonds. That necessarily means that they shall not be so considered until the happening of that event; and it is that complete and perfected registration, and that alone, which confers upon the holder of such bonds the benefits of the act.

The bonds that were in controversy in the case of Lewis *v.* Com'rs, supra, were issued under the act of 1872, and their registration was governed by the provisions of the statute relating to that class. The bonds on which the present suit is based were issued under the act of 1870, and belong to the class the registration of which is governed by the provisions of the fifteenth section of the act.

It is alleged in the petition that "each of said bonds, with all the interest coupons thereto attached, was duly registered in the office of the auditor of the State of Kansas, according to law, and the fact that each of the said bonds was so registered was then and there, under the hand and official seal of the said auditor, in writing, duly certified and indorsed upon each of the said bonds," and a copy of the certificate and indorsement is set out as already exhibited. But it is not alleged that the auditor notified the officers of Cherokee County of this record, nor that these officers entered the fact in the record kept by themselves; and without these additional steps, what was done by the auditor was incomplete and ineffective. Without showing compliance with these requisitions, the bonds cannot be considered registered bonds, nor entitled as such to the benefits of the act.

If complete and conclusive effect were, on the contrary, given to the ex parte record of the auditor of State, as is claimed for it, the obvious design and just purpose of the statute would be not secured, but subverted; and municipal corporations might be subjected to liability for bonds purporting to be issued by them, which in fact and in law were not their obligations by virtue of a proceeding of which they had no notice, resulting in an adjudication which they had no opportunity of contesting. A construction of the statute that necessarily leads to that conclusion is not warranted by its terms, and would be repugnant to fundamental principles of

common right. If the registration of bonds issued under the act itself is to have the force of an adjudication by the auditor, the preliminary record by the officers of the municipal corporation transmitted to him must be the indispensable foundation of his jurisdiction, without which he cannot lawfully act; and as to bonds issued, as were these now in suit under previous statutes, the action of the auditor is itself but the preliminary proceeding of which confirmation by the subsequent record of the officers issuing them is essential to its efficacy as a registration. If these officers refuse to recognize the registry of the auditor, whether rightfully or wrongfully, the holder loses no rights. He has the bonds as he acquired them, and may test the liability of the corporation by judicial proceedings. If, on the other hand, the statute is construed to allow him by a proceeding before the auditor conclusively to fix the liability of the municipal corporation without notice and without a hearing, certainly, in respect to bonds previously issued, it would be open to the gravest objections on constitutional grounds, for if a law cannot impair the obligation of a contract, neither can it create one, or by a mere fiat take from a party an existing and meritorious defence. It appears then, by the record in this cause, that the bonds sued on are not the obligations of the defendant in error.

The judgment in its favor is therefore affirmed.

Signature to Bonds.—Upon this point compare the principal case with Draper v. Springport, 5 Am. & Eng. R. R. Cas. 205.

Recitals.—A collection of the authorities upon this point will be found in Northern Bank of Toledo v. Porter Township Trustees, and note, supra. See also cases, infra.

Registry.—As to the registration of municipal bonds the reader is referred to the following authorities: Prairie v. Lloyd, 3 Am. & Eng. R. R. Cas. 58; Lewis v. Barbour Co., 12 Am. & Eng. R. R. Cas. 615; Ralls Co. v. United States, 105 U. S. 733; Anthony v. Jasper Co., 101 U. S. 693; Hoff v. Jasper Co., infra; Dixon County v. Field, infra.

HOFF

v.

JASPER COUNTY.

(110 *United States Reports*, 53.)

When a municipal corporation subscribes to the capital stock of a railroad company, and issues its bonds in payment therefor, the bonds must comply with the requisitions which the law makes necessary in respect of registration and certificate before they are issued; and innocent holders for value are

charged with the duty of knowing these laws, and of inquiring whether they have been complied with.

A statute requiring a State auditor to register municipal bonds and to certify that all the conditions of law have been complied with in their issue calls for the exercise of no judicial functions on his part.

SUIT to recover on coupons on bonds issued by a county in payment of subscription to stock of a railroad company by a township within the county. The facts were in all respects the same as those in Anthony *v.* County of Jasper, 101 U. S. 693, except that here it was expressly found that the subscription of the township which was voted had actually been made by the County Court and accepted by the railroad company before the act providing for the registration of bonds was approved, while there the acceptance of the subscription before the approval of the act did not appear unless by implication. The vote of the township was taken on the 5th of March, 1872; the order of the County Court for the subscription entered on the 28th of March, and on the same day the subscription was actually made and accepted. The registration act was approved March 30th.

James S. Bottsford for plaintiff in error.

E. J. Montague for defendant in error.

WAITE, C. J.—Upon the additional fact found in this case it is insisted:

1. That if the registration act was applicable to the bonds now in question, it impaired the obligation of the contract of subscription, and is therefore, so far as such application is concerned, in contravention of art. I., sec. 10, clause 1, of the Constitution of the United States; and,

2. That it was retrospective in its operation, and therefore in contravention of art. I., sec. 28, of the Constitution of Missouri, which is:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, can be passed."

It is also insisted that the 4th section of the act is in contravention of the Constitution of Missouri, because it delegates the exercise of judicial power to an executive officer of the State.

The first two objections may be considered together, and to our minds they are disposed of by the paragraph in the opinion in Anthony *v.* County of Jasper, which is as follows (p. 699):

"It matters not that when the bonds were voted the registration law was not in force. Before they were issued it had gone into effect. It did not change in any way the contract with the railroad company. The company was just as much entitled to its bonds when it complied with the conditions under which they were voted after the law, as it could have been before. All the legislature attempted to do was to provide what should be a good bond when

issued. There was nothing changed but the form of the execution."

That is clearly the true construction of the 4th section of the act. The contract of subscription undoubtedly gave the company the right to valid negotiable bonds executed in due form of law. The section simply provides that before any bond thereafter issued shall be deemed to have been completely executed, it must have upon it the requisite certificate of the Auditor of State. When so certified, if otherwise in proper form, it may be issued as a duly executed negotiable public security. The provision that the certificate of the auditor "shall be prima facie evidence only of the facts therein stated" does not of itself open the bonds to attack in the hands of a bona fide holder. Before this law a bond, in due form issued under a power conferred by the legislature, could not be impeached in the hands of a bona fide holder for fraud or irregularities in the execution of the power by those charged with that duty. The law does not interfere with this; it simply says that the certificate which the auditor is to give shall not prevent such an impeachment, that is to say, shall not operate as an estoppel. The certificate, so far from casting suspicion on the bond, gives additional credit, for it shows that an officer of the State specially charged with the duty has examined and certified officially "that all the conditions of the law have been complied with," "and also that the conditions of the contract under which they [the bonds] were ordered to be issued have also been complied with." Such a bond certainly can have no less credit in the market than it would have without the official certificate.

Neither, in our opinion, does the fact that one more officer must examine and certify the bond before it can be issued place such an additional burden on the parties to the subscription as to impair the obligation of their contract. It is in reality no more than providing that two officers shall sign a municipal bond instead of one before the body politic shall be bound by an instrument to be put on the market and sold as commercial paper. We cannot believe, if when the subscription was made, a bond, if signed by the presiding justice of the County Court alone, would have been sufficient, it would be contended that the obligation of the contract of subscription was impaired by a law passed afterwards that required the signature of the clerk of the court to the bond as well as that of the presiding justice. In the view we take of the case, the requirement of the signature and certificate of the Auditor of State is nothing more in legal effect than that. By the contract of subscription the township agreed to take stock and pay for it in valid negotiable bonds, and the company agreed to take the bonds and give the stock. All the new law has done is to provide what shall be a valid negotiable bond of the township, and this by providing additional guaranties against fraudulent and irregular issues. Of such a pro-

vision honest parties cannot complain, for it is always to be presumed that a public officer will do whenever called on what the law requires of him.

As to the objection that the duties of the Auditor, in respect to his inquiries under the 4th section, are judicial rather than executive, it is sufficient to say that every executive officer, when called on to act in his official capacity, must inquire and determine whether, on the facts, the law requires him to do one thing or another. The due execution of these bonds was an executive act, and the Auditor of State was made by law one of the executive officers whose duty it was to take part in their execution. The inquiries he is required to make do not differ in their character from those the presiding justice of the County Court should have made when he affixed his signature. The certificate of the auditor being according to the statute prima facie evidence only of the facts stated, amounts to nothing more than that in his opinion the circumstances are such that the bonds may properly go out as commercial paper of the kind they appear on their face to be. It binds no one. It simply states the opinion of this executive officer on the questions he was called on to consider in his official capacity. It makes the bond complete in the form of its execution, and in law does nothing more.

We are of opinion that this case is in no respect distinguishable from Anthony *v.* County of Jasper, and upon that authority

The judgment is affirmed.

See Bissell *v.* Township of Spring Valley, and note, supra; and Dixon Co. *v.* Field, infra.

DIXON COUNTY
v.
FIELD.

(111 *United States Reports*, 83.)

There must be authority of law, by statute, for every issue of bonds of a municipal corporation as a gift to a railroad or other work of internal improvement.

When the Constitution, or a statute of a State requires as essential to the validity of municipal bonds that they shall be registered in a State registry and receive by indorsement a certificate of one or more State officers showing that they are issued in pursuance of law, and the Constitution or law gives no conclusive effect to such registration or to such certificate, the municipality is not concluded by the certificate from denying the facts certified to.

A recital in a municipal bond of facts which the corporate officers had

authority by law to determine and to certify estops the corporation from denying those facts; but a recital there of facts which the corporate officers had no authority to determine, or a recital of matters of law does not estop the corporation.

Section 2, Article XII. of the Constitution of Nebraska, which took effect November 1st, 1875, conferred no power upon a county to add to its authorized or existing indebtedness, without express legislative authority; but it limited the power of the legislature in that respect by fixing the terms and conditions on which alone it was at liberty to authorize the creation of municipal indebtedness.

THIS was a suit to recover the amount of overdue interest coupons on bonds issued by the plaintiff in error in aid of a railroad. The defence was that the bonds were issued in violation of provisions of the Constitution of Nebraska which are set forth in the opinion of the court, and without legislative authority. The holder of the bonds contended that the municipality was estopped from setting up this defence by reason of certain recitals in the bonds, and of certain certificates of State officers on the back of them, which are also referred to in the opinion. The judgment below was against the county. This writ of error was sued out to review that judgment.

A. J. Poppleton and J. M. Thurston for plaintiff in error.

W. L. Joy and George G. Wright for defendant in error.

MATTHEWS, J.—This writ of error brings into review a judgment in favor of the defendant in error, for the amount of certain overdue coupons upon municipal bonds, purporting to be obligations of the plaintiff in error.

The facts upon which the judgment is based are as follows:

1. The defendant in error is the innocent holder for value of the coupons sued on, and of the bonds to which they belong. These bonds are part of a series, eighty-seven in number, being for $1000 each, payable to the Covington, Columbus & Black Hills R. R. Co. or bearer in New York, on January 1st, 1896, with interest from January 1st, 1876, until paid, at the rate of 10 per cent per annum, payable semi-annually. They are executed in proper form under the seal of the county, and were issued as a donation to the railroad company in aid of the construction of its road.

2. Each bond contained the recital that it was "issued under and in pursuance of an order of the county commissioners of the County of Dixon, in the State of Nebraska, and authorized by an election held in said county on the 27th day of December, 1875, and under and by virtue of chapter 35 of the General Statutes of Nebraska, and amendments thereto, and the Constitution of said State, art. 12, adopted October, A.D. 1875.

3. On the back of each bond was the certificate of the county clerk reciting that this issue of bonds was the only one ever made by the county; that "the question of issuing said bonds was sub-

mitted to the people of the county by a resolution of the county commissioners, dated November 24th, 1875, in the following form: "Shall Dixon County issue to the C., C. & Black Hills R. R. Co., $87,000 10 per cent. 20-year bonds, payable both principal and interest in New York City, and shall a tax be annually levied, in addition to the usual taxes, sufficient to pay the interest as it becomes due, and accumulate a sinking fund to pay the principal at maturity?" and further, "this question was decided by a vote taken December 27th, 1875, of 462 votes for and 120 against." This certificate is witnessed by the hand and official seal of the clerk, of date May 16th, 1876.

4. There was also indorsed on each bond the certificate of the secretary and auditor of the State of Nebraska, dated October 2d, 1876, that "it was issued pursuant to law," and the further certificate of the auditor of same date "that upon the basis of data filed in my office, it appears that the attached bond has been regularly and legally issued by the county of Dixon to C., C. & B. H. R. R. Co., and said bond, upon presentation thereof by said company, has this day been duly registered in my office in accordance with the provisions of an act entitled 'An act to authorize the registration, collection and redemption of county bonds, approved February 25th, 1875.'"

5. That the assessed valuation of all the taxable property of the county of Dixon, the plaintiff in error, at the last previous assessment and valuation, made in the spring of 1875, and which continued in force until the spring of 1876, and which was shown and appeared from the books of public record of said county, was five hundred and eighty-seven thousand three hundred and thirty-one ($587,331) dollars and no more; and of which the amount of the bonds, issued in pursuance of said election, was more than 10 per cent but less than 15 per cent.

The statute referred to on the face of the bonds, chapter 35 of the General Statutes of Nebraska, authorizes any county or city in the State "to issue bonds to aid in the construction of any railroad or other work of internal improvement, to an amount to be determined by the county commissioners of such county or the city council of such city, not exceeding 10 per cent of the assessed valuation of all taxable property in said county or city," with an additional proviso requiring a previous submission of the question of issuing such bonds to a vote of the legal voters of the county of city, in the manner provided by law, for submitting to the people or a county the question of borrowing money. It was also provided that the proposition of the question should be accompanied by a provision to levy a tax annually for the payment of the interest on the bonds as it should become due, stating also the rate of interest and the time when the principal and interest should be made payable. Upon a majority of the votes cast being in favor of the proposi-

the creation of municipal indebtedness. The language of the proviso that seems to countenance a contrary construction, by words apparently conferring immediate power upon counties to increase their indebtedness, must be taken in connection with the express and positive prohibition of the body of the section. This denies to municipal bodies all power to make any donations to railroads or other works of internal improvement, except by virtue of legislative authority, and an election held to vote on the particular proposition in pursuance thereof. The proviso makes a special rule for a special case, and authorizes an additional amount of indebtedness, but only to be contracted in the contingency mentioned, and subject to the condition already prescribed for all donations, that is, by means of an election to decide the question submitted, held in pursuance of statutory authority. An indebtedness to the extent of ten per cent on the assessed value of the taxable property may be authorized by statute, to be sanctioned by a mere majority of the popular vote; but no more than that amount shall be permitted by the legislature, except when approved by two thirds of the electors; and in no event more than fifteen per cent upon the assessment, in the aggregate, including any pre-existing indebtedness. Whether the whole amount of indebtedness, authorized by the Constitution, to the extent of fifteen per cent on the assessed value of the taxable property may be contracted, by authority of an act of the legislature, authorizing its creation at one election upon a single vote, it is unnecessary to decide, for, in the present case, there was no legislative authority to create a debt in excess of the ten per cent upon the assessment.

These views coincide with those expressed by the Supreme Court of Nebraska in the case of Reineman v. The Covington, Columbus, etc., R. R. Co., 7 Nebraska, 310, where the very question raised here was discussed and decided; so that the construction we have adopted of the Constitution of the State we cannot but regard as not only correct in itself, but as now the settled rule of decision established by the highest judicial tribunal of the State.

It follows that the bonds in question were issued without warrant of law, and if the defence is permitted, must be declared void, and insufficient to support the judgment.

But it is argued on the part of the defendant in error that the plaintiff in error is estopped, by the recitals in the bonds, to allege their invalidity on this ground.

The recitals in the bonds, which are relied on for this purpose, are as follows:

"This bond is one of a series of eighty-seven thousand dollars issued under and in pursuance of an order of the county commissioners of the county of Dixon, in the State of Nebraska, and authorized by an election held in the said county on the twenty-seventh day of December, A.D. 1875, and under and by virtue of

chapter 35 of the General Statutes of Nebraska, and amendments thereto, and the Constitution of the said State, article XII., adopted October, A.D. 1875."

These recitals, in conjunction with the certificate of the county clerk, and those of the Secretary and Auditor of State, it is claimed, declare a compliance with the law in the issue of the bonds, which, as against an innocent holder for value, cannot now be questioned.

The sixth section of chapter 35 of the General Statutes, act of February 15th, 1869, p. 93, provides that "any county or city which shall have issued its bonds in pursuance of this act shall be estopped from pleading want of consideration therefor;" and an act passed February 25th, 1875, authorizes the registration of county bonds, with a view to their collection and redemption. It requires the county officers, in the first place, to make registration of all the named particulars in respect to the bonds issued by them, a certified statement of which, made out and transmitted by them, is required to be recorded by the Auditor of State. Whenever the holders of county bonds shall present the same to the Auditor of State for registration, the auditor, upon being satisfied that such bonds have been issued according to law, it is further provided, shall register the same in his office in a book to be kept for that purpose, in the same manner that such bonds are registered by the officers issuing the same, and shall, under his seal of office, certify upon such bonds the fact that they have been regularly and legally issued, and that such bonds have been registered in his office in accordance with the provisions of the act. This registration is made the basis on which he ascertains the amount of taxes annually to be levied to meet the accruing interest and sinking fund to be certified to the county clerk, who is to ascertain and levy the tax for that purpose, to be collected and paid to the county treasurer.

The section of article XII. of the Constitution already cited, requires, as essential to the validity of municipal bonds, an indorsement thereon of a certificate signed by the Secretary of State and Auditor of State, showing that the same is issued in pursuance of law.

No conclusive effect is given by the Constitution or the statute to this registration, or to these certificates; and in the consideration of the question of estoppel, they may be laid out of view. In any event, they could not be considered as more comprehensive or efficacious than the statements contained in the body of the bonds, and verified by the signature of the county officers and the seal of the county, except as additional steps, required to be taken in the process of issuing the bonds and rendered necessary to their validity.

Recurring then to a consideration of the recitals in the bonds, we assume, for the purpose of this argument, that they are in legal

assessed value of the property for purposes of taxation. The amount of the bonds issued was known. It is stated in the recital itself. It was $87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but, ex vi termini, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount, as fixed by reference to that record, that is made by the Constitution the standard for measuring the limit of the municipal power. Nothing in the way of inquiry, ascertainment or determination as to that fact, is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the exercise of their functions, and the performance of their duty; but the information is for themselves alone. All the world besides must have it from the same source, and for themselves. The fact, as it is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it.

The case is to be distinguished from Marcy *v.* Township of Oswego, 92 U. S. 637, where, although it was provided that the amount of the bonds voted by any township should not be above such a sum as would require a levy of more than one per cent per annum on the taxable property of such township to pay the yearly interest, it was held that the existence of sufficient taxable property to warrant the amount of the subscription and issue, it not being designated as fixed by the assessment, was one of those prerequisite facts to the execution and issue of the bonds, which was of a nature that required examination and decision, and had been referred by the statute to the inquiry and determination of the board. In Sherman County *v.* Simons, 109 U. S. 735, the county commissioners were constituted by the statute the tribunal for the purpose of determining the amount of the indebtedness, in excess of which the bonds were not to be issued, and their decision was accordingly held to be conclusive.

On the other hand, it is within the principle of the decision in Buchanan *v.* Litchfield, 102 U. S. 278, where it was said, at page 289, that, "the purchaser of the bonds was certainly bound to take notice, not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city for the year 1873." And it is directly within the decision in

National Bank *v.* Porter Township, 110 U. S. 608. In that case, the existence of the power to issue the township bonds in suit, depended upon the fact that the county commissioners had not been previously authorized by a popular vote, or an unreasonable delay in taking one, to make a subscription on behalf of the county. It was there said: "Whether they had not been so authorized, that is, whether the question of subscription had or had not been submitted to a county vote, or whether the county commissioners had failed for so long a time to take the sense of the people as to show that they had not, within the meaning of the law, been authorized to make a subscription, were matters with which the trustees of the township, in the discharge of their ordinary duties, had no official connection and which the statute had not committed to their final determination. Granting that the recital in the bonds that they were issued 'in pursuance of the provisions of the several acts of the General Assembly of Ohio,' is equivalent to an express recital that the county commissioners had not been authorized by a vote of the county to subscribe to the stock of this company, and that, consequently, the power conferred upon the township was brought into existence, still it is the recital of a fact arising out of the duties of county officers, and which the purchaser and all others must be presumed to know did not belong to the township to determine, so as to confer or create power, which under the law did not exist."

We hold, therefore, that the plaintiff in error is not estopped by the recitals in the bonds to deny their validity; and that having been issued in contravention of the Constitution of the State, they are without warrant of law and are void.

The judgment of the Circuit Court is, therefore, erroneous, and must be reversed; and as the facts appear upon the pleadings and by a special verdict, the cause is remanded with directions to enter judgment for the defendant below.

Power of Municipalities to Subscribe in Aid of Railroads.—Municipalities have no inherent or implied right to subscribe to or to issue bonds in aid of a railroad company, although the purpose may be to enable such company to construct its roads by or through such municipality.

St. Joseph Township *v.* Rogers, 16 Wall. 644; South Ottawa *v.* Perkins, 94 U. S. 260; People *v.* Mitchell, 35 N. Y. 551; Pa. R. R. Co. *v.* Philadelphia, 47 Pa. St. 189; Lamoille Valley R. R. Co. *v.* Fairfield, 51 Vt. 257; Delaware County *v.* McClintock, 51 Md. 325; Jeffries *v.* Lawrence, 42 Iowa, 498; Barnes *v.* Lacon, 84 Ill. 461; French *v.* Feschemaker, 24 Cal. 518; Brodie *v.* McCabe, 33 Ark. 690; Lewis *v.* Shreveport, 3 Woods, 205; Pitzman *v.* Freeburg, 92 Ill. 111; Welch *v.* Post, 5 Am. & Eng. R. R. Cas. 158; Lewis *v.* Shreveport, 12 Am. & Eng. R. R. Cas. 683; Tax-Payers of Milan *v.* Tenn. R. R. Co., 11 Tenn. 329; Weightman *v.* Clark et al., 103 U. S. 251.

Registration.—As to the registration of municipal bonds in aid of railroads, the reader is referred to Prairie *v.* Lloyd, 3 Am. & Eng. R. R. Cas. 58; Lewis *v.* Barbour Co., 12 Am. & Eng. R. R. Cas. 615; Anthony *v.* Jasper Co., 101 U. S. 693; Ralls Co. *v.* United States, 105 U. S. 733; Hoff *v.* Jasper Co., supra.

Recitals.—For a collection of the leading authorities as to the effect of recitals in municipal bonds see Northern Bank of Toledo v. Porter Township Trustees and note, supra; Bissell v. Spring Valley Township supra; Carroll County v. Smith, infra.

CARROLL COUNTY
v.
SMITH.

(111 *United States Reports*, 556.)

A recital in a bond issued by a municipal corporation in payment of a subscription to capital stock in a railway company, that it is authorized by a statute referred to by title and date, does not estop the municipality in a suit on the bond from setting up that the issue was not authorized by vote of two thirds of the voters of the corporation, as required by the Constitution of the State.

A provision in the Constitution of Mississippi, that the legislature shall not authorize a county to lend its aid to a corporation unless two thirds of the qualified voters shall assent thereto at an election to be held therein, does not require an assenting vote of two thirds of the whole number enrolled as qualified to vote, but only two thirds of those actually voting at the election held for the purpose.

The issuing of a temporary injunction, which was afterwards made permanent, by a State court, restraining municipal officers from issuing municipal bonds, does not estop a bona fide holder for value, who was no party to the suit, from maintaining title to such bonds issued after the temporary injunction.

The decision of the highest court of a State, construing the Constitution of the State, is not binding upon this court as affecting the rights of citizens of other States in litigation here, when it is in conflict with previous decisions of this court, and when the rights which it affects here were acquired before it was made.

THIS was an action at law brought to recover the amount of certain overdue interest coupons, upon municipal bonds, alleged to be obligations of the plaintiff in error, delivered and payable to the Greenville, Columbus & Birmingham R. R. Co. or bearer, for $1000 each. Each bond contained the following recital:

"The above mentioned sum being a part of a subscription to the capital stock of the Greenville, Columbus & Birmingham R. R. Co., authorized by the following styled acts of the State of Mississippi, viz.: An act entitled 'An act to incorporate the Arkansas City & Grenada R. R. Co.,' approved March 5th, A.D. 1872, and an act entitled 'An act to amend an act entitled an act to incorporate the Arkansas City & Grenada R. R. Co., approved March 5th, 1872,' approved March 4th, A.D. 1873."

The act first referred to contained the following:

"Sec. 19. Be it further enacted, That upon application by the

president or other authorized agent of said corporation to the constituted authorities of any county, city or incorporated town in the State of Mississippi, or adjacent to the main line and branch railroad of this corporation, for a subscription to a specified amount of the capital stock of said corporation, said constituted authorities are hereby required, without delay, to submit the question of 'subscription' or 'no subscription' to the decision of the qualified voters of said county, city or incorporated town, at a special or regular election to be held therein, and if two thirds of said qualified voters be in favor of said subscription, the constituted authorities of said counties, cities or incorporated towns are hereby required, without delay, and are authorized and required to subscribe to the capital stock of said corporation to the amount agreed upon; and bonds of the county, city or incorporated town making the subscription, having such time to run and such rates of interest as may be agreed upon, shall be issued, without delay, by the authorities of the counties, cities, or incorporated towns, to the president and directors of said corporation, to the amount of said subscription to the capital stock." . . .

The second act recited had the effect merely to change the name of the company to that of "The Greenville, Columbus & Birmingham R. R. Co."

The complaint alleged that the bonds and coupons described were delivered by the county of Carroll to the railroad company, for value, and that the plaintiff became a purchaser thereof for a valuable consideration before maturity, and was an innocent holder thereof without notice.

The defendant pleaded three pleas, of which the first in order is as follows:

"And for further plea in this behalf said defendant, by attorney, says actio non, because it says that on the 3d day of March, 1873, on the application of the president of the Greenville, Columbus & Birmingham R. R. Co., a corporation in this State, the board of supervisors of the county of Carroll ordered a special election to be held in said county on the 1st day of April, 1873, at which the question of subscription, or no subscription, by said county to the capital stock of said railroad company was to be submitted to the qualified voters of said county. And said defendant avers that said election was accordingly held, and said defendant avers that on the 1st day of April, 1873, the names of 3129 registered voters were on the registration books of said county, and there were in fact on the 1st day of April, 1873, three thousand one hundred and twenty-nine qualified voters in said county, but that only 1280 of said voters voted at said election, of whom 918 voted in favor of the proposition to subscribe for said stock and 362 voted against it, as fully appears by the returns of the three registrars of said county, filed with the clerk of said board of supervisors of

said county. And said defendant says that, notwithstanding the refusal of two thirds of the qualified voters of said county to vote in favor of the subscription for stock, the then board of supervisors of said county, in violation of their duty and the trusts reposed in them, and in violation of the Constitution of the State of Mississippi, subscribed to the capital stock of said railroad company, and issued the bonds and coupons in the declaration mentioned in fact, for said subscription for said capital stock in said railroad company, without any statement or recital in said bonds that two thirds of the qualified voters of said county had assented thereto. And this the said defendant is ready to verify. Wherefore it prays judgment, etc."

The second was like the first, with the additional averments that the said returns of the registrars of the county, filed and deposited with the clerk of the said board of supervisors of said county, was "at all times open to the inspection of all persons in the public office of the clerk of the Chancery Court of said county; and said defendant avers that the said registration of voters of said county was a book of record, deposited and kept in the public office of the clerk of the Chancery Court of said county as a record book and open for inspection to all persons, and exhibited the fact that there were 3129 registered voters in said county at the time of the election."

The third plea was like the second, with the addition of the following:

"And said defendant avers that before the issuance of any of the bonds and coupons in the declaration mentioned, a bill was exhibited by citizens and tax-payers of said county against the said board of supervisors in the Chancery Court of the county of Carroll to restrain and enjoin said board of supervisors from the issuance and delivery of the bonds of said county upon a subscription of stock in said railroad company; and thereupon an injunction was ordered and issued, before the issuance and delivery of any of the bonds and coupons mentioned in the declaration, restraining and enjoining the said board of supervisors from the issuance and delivery of such bonds. And said defendant avers that the said bill of injunction was sustained and made perpetual by the judgment and decree of the Supreme Court of the State of Mississippi. And said defendant says that, notwithstanding the issuance and pendency of said injunction, and notwithstanding the refusal of two thirds of the qualified voters of said county to vote for said subscription for stock in said railroad company, the said board of supervisors fraudulently and illegally issued and delivered the bonds and coupons in the declaration mentioned in fact, for a subscription for stock in said railroad company. And this the said defendant is ready to verify. Wherefore it prays judgment."

A demurrer to each of these pleas was sustained, and judgment

rendered for the plaintiff below, to reverse which this writ of error was prosecuted.

J. Z. George for plaintiffs in error.

Charles B. Howry for defendant in error.

MATTHEWS, J.—He stated the facts in the foregoing language, and continued:

The provision in the charter of the railroad company authorizing the issue of bonds in payment of subscriptions by municipal bodies to its capital stock, is based upon article 12, section 14, of the Constitution of the State, which declares that—

"The legislature shall not authorize any county, city or town to become a stockholder in, or to lend its credit to, any company, association or corporation, unless two thirds of the qualified voters of such county, city or town, at a special election or regular election to be held therein, shall assent thereto."

It is claimed, on behalf of the plaintiff in error, that the qualified voters referred to in the Constitution of Mississippi and the charter of the railroad company, are those who have been determined by the registrars to have the requisite qualifications of electors, and who have been enrolled by them as such, and that it requires a vote of two thirds of the whole number enrolled as qualified to vote, and not merely two thirds of such actually voting at an election for that purpose, to authorize the issue of such bonds as those in suit.

That presents the single question for our decision, for the averment in the last plea, that "the board of supervisors fraudulently and illegally issued and delivered the bonds and coupons," has reference merely to their being issued without the alleged requisite assent of two thirds of the registered voters, and there is nothing alleged in the plea from which it can be inferred that the injunction bill, pending which the bonds, it is charged, were issued and delivered, was based on any other infirmity.

We do not think the plaintiff in error is precluded from raising this question by any recitals in the bonds. They contain no statement of any election called or held, or of the vote by which the issue of the bonds was authorized. They do not embody even a general statement that the bonds were issued in pursuance of the statutes referred to. The utmost effect that can be given to them is that of a statement, that a subscription to the capital stock of the railroad company was authorized by the statutes mentioned, and that the sum mentioned in the bonds was part of it. They serve simply to point out the particular laws under which the transaction may lawfully have taken place. They say nothing whatever as to any compliance with the requirements of the statute in respect to which the board of supervisors were authorized and

appointed to determine and certify. They do not, therefore, within the rule of decision acted on by this court, constitute an estoppel, which prevents inquiry into the alleged invalidity of the bonds. Northern Bank of Toledo v. Porter Township, 110 U. S. 608; s. c., supra; Dixon County v. Field, 111 U. S. 83; s. c., supra; School District v. Stone, 106 U. S. 183.

On the other hand, we do not agree with the counsel for the plaintiff in error, that the pendency of the injunction bill, referred to in the last plea, affects the title of the defendant in error, as a bona fide holder of the bonds for value; or that this court is bound to follow and apply the judgment of the Supreme Court of Mississippi, in that case, reported as Hawkins v. Carroll County, 50 Miss. 735, perpetuating the injunction, on the ground that the Constitution and laws of the State required a majority of two thirds of those qualified to vote to be cast at the election, to support the validity of the bonds.

The defendant in error was no party to that suit, and the record of the judgment is therefore no estoppel. The bonds were negotiable, and there was, therefore, no constructive notice of any fraud or illegality, by virtue of the doctrine of lis pendens. County of Warren v. Marcy, 97 U. S. 96. It is not alleged in the plea that the defendant in error had actual notice of the litigation, or of the grounds on which it proceeded, or that any injunction was served upon the board of supervisors; and, if he had, that notice would have been merely of the question of law, of which, as we have seen, he is bound to take notice, at all events, and which is now for adjudication in this case. There is nothing in the case of Williams v. Cammack, 27 Miss. 209, 224, to which we are referred by counsel on this point, inconsistent with these views.

The decision in Hawkins v. Carroll County, above referred to, is not a judgment of the Supreme Court of Mississippi, construing the Constitution and laws of the State, which, without regard to our own opinion upon the question involved, we feel bound to adopt and apply in the present case. It is a decision upon the very bonds here in suit, pronounced after the controversy arose, and between other parties. It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts, to determine for themselves what is the law of the State, by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one State, suing in another, the choice of resorting to

a federal tribunal. Burgess *v.* Seligman, 107 U. S. 20, 33; s. c., 9 Am. & Eng. R. R. Cas., 655.

We have, however, considered the reasoning of the Supreme Court of Mississippi, in its opinion in the case of Hawkins *v.* Carroll County, with the respect which is due to the highest judicial tribunal of a State speaking upon a topic as to which it is presumed to have peculiar fitness for correct decision, and, while we are bound to admit the carefulness and fulness of its examination of the question, we are not able to adopt its conclusions. On the contrary, we are constrained to follow the decision in St. Joseph Township *v.* Rogers, 16 Wall. 644, and adhere to the views expressed by this court in County of Cass *v.* Johnston, 95 U. S. 360, in deciding the same question upon the construction of a provision of the Constitution of Missouri, which is identical with that of the Constitution of Mississippi under consideration. It was there declared and decided, that "all qualified voters, who absent themselves from an election duly called, are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed," page 369. In Missouri, as in Mississippi, there was a constitutional provision requiring a registration of all qualified voters. State *v.* Sutterfield, 54 Missouri, 391.

Much stress in the argument was laid by the Supreme Court of Mississippi upon the registration record, as furnishing the standard by which to ascertain the proportion of qualified voters, whose assent was required by the Constitution. On this point, they say, 50 Miss. 761: "There exists, therefore, in each county a registration of the list of voters, which ought to show, with approximate accuracy, the names of those entitled to vote, 'at any election.' In ascertaining, therefore, the result of an election requiring two thirds of the qualified voters of the county to assent thereto, we think that the registration books are competent evidence on the point of the number of qualified voters in the county. It would be open to proof to show deaths, removals, subsequently incurred disqualifications, etc. When the Constitution uses the term 'qualified electors,' it means those who have been determined by the registrars as having the requisite qualifications by enrolling their names, etc. It would be a fair construction of the 14th section to hold that the 'two thirds' meant that number of the whole number whose names had been enrolled as legal voters. That furnished official evidence of those prima facie entitled to vote. But, in this case, in addition to the information contained in the registration books, it is admitted that there were from 2000 to 2500 qualified voters in Carroll County at the date of this election. The proposition submitted did not have the assent of two thirds, as required

by the Constitution. The difficulty of proving the number of voters in the county has been obviated by this admission."

But this reasoning, as it seems to us, does not meet, much less overcome, the difficulty of the argument. The Constitution of Mississippi, although it does not recognize any voters as qualified, except such as are registered, does not make all persons, registered as such, qualified. And yet, if it is to be construed, in the clause in question, as referring to the registration as conclusive of the number of qualified voters, then no proof is competent to purge the list of those who never were qualified, or have died, removed, or become otherwise disqualified, thus obliterating the distinction between registered and qualified voters; and if, on the other hand, it is to be construed as meaning voters qualified, in fact and in law, without reference to the sole circumstance of registration, then the body of electors is as indefinite as though there were no registration, and the determination of the whole number, if an actual enumeration is required to determine how many are two thirds thereof, is completely a matter in pais, and must be inquired of and ascertained, in each case, by witnesses. The difficulty, if not the impossibility, of reaching results by such methods, amounts almost to demonstration, that such could not have been the legislative intent, or the meaning of the Constitution. The number and qualification of voters at such an election, is determinable by its result, as canvassed, ascertained and declared by the officers appointed to that duty, or as subsequently corrected by a contest or scrutiny in a direct proceeding, authorized and instituted for that purpose; it cannot be contested in any collateral proceeding, either by inquiry as to the truth of the return, or by proof of votes not cast, to be counted as cast against the proposition, unless the law clearly so requires. In our opinion, the Constitution of Mississippi did not mean, in the clause under consideration, to introduce any new rule. The assent of two thirds of the qualified voters of the county, at an election lawfully held for that purpose, to a proposed issue of municipal bonds, intended by that instrument, meant the vote of two thirds of the qualified voters present and voting at such election in its favor, as determined by the official return of the result. The words "qualified voters," as used in the Constitution, must be taken to mean not those qualified and entitled to vote, but those qualified and actually voting. In that connection a voter is one who votes, not one who, although qualified to vote, does not vote.

We are consequently of opinion, that there is no error in the judgment of the Circuit Court, and it is accordingly

Affirmed.

Recitals.—As to the general effect of recitals in municipal aid bonds operating by way of estoppel, see Northern Bank of Toledo v. Porter Town-

ship Trustees and note supra, and also Bissell *v.* Spring Valley Township, supra; Dixon County *v.* Field, supra.

Elections.—Majority of Voters.—Where a statute prescribes that the assent of the majority or of two thirds of the voters of a municipality shall be requisite to the valid performance of some municipal act, the act is ordinarily construed to mean that the assent of a majority or two thirds of those actually voting is sufficient. State *v.* Mayor, etc., 37 Mo. 270; State *v.* Binder, 38 Mo. 450; People *v.* Warfield, 20 Ill. 163; People *v.* Weant, 48 Ill. 263; Talbot *v.* Dent, 9 B. Monr. 526; Railroad Co. *v.* Davidson County, 1 Sneed (Tenn.), 692; Prairie *v.* Lloyd, 3 Am. & Eng. R. R. Cas. 58. But see State *v.* Winkelmeier, 35 Mo. 103; Adams *v.* Kokomo, 12 Am. & Eng. R. R. Cas. 585.

Following State Courts.—The question of how far the Supreme Court of the United States will follow the adjudications of State courts in regard to the validity of municipal aid bonds, and when they will follow earlier decisions instead of later ones, is fully reviewed in Amoskeag National Bank *v.* Ottawa, 12 Am. & Eng. R. R. Cas. 546, and Taylor *v.* Ypsilanti, 12 Am. & Eng. R. R. Cas. 549, and in the annotations to the latter case, in which all the authorities bearing on the point are collected. See also Green County *v.* Conness, infra.

GREEN COUNTY
v.
CONNESS.

(109 *United States Reports*, 104.)

The court adheres to its former rulings in regard to the liability of municipal corporations to innocent holders of the bonds of such corporations, issued in aid of railroads.

The rights of such holders are to be determined by the law as it was judicially construed to be when the bonds were put on the market as commercial paper.

A consolidation of two railroad corporations merges the franchises and privileges of each in the new company, so that they continue to exist in respect to the roads thus consolidated.

SUIT to recover coupons due on bonds issued by the county in payment of a subscription made by virtue of the laws of the State of Missouri, to aid in the construction of a railroad that became consolidated with the Hannibal and St. Joseph R. R. The authority to lend the aid was obtained before the consolidation, and was exercised after it. The defendant in error was the owner and holder for value of some of the bonds before maturity. Judgment against the county in the court below. Error to reverse that judgment.

The case was submitted by P. T. Simmons, Charles W. Thrasher, and Henry C. Young on behalf of the plaintiff in error, and by James S. Bottsford, Marcus T. C. Williams, and Robert G. Ingersoll on behalf of the defendant in error.

BRADLEY, J.—Nearly every point in this case has already been decided by this court in the cases of County of Callaway v. Foster, 93 U. S. 567; County of Scotland v. Thomas, 94 U. S. 682; County of Henry v. Nicolay, 95 U. S. 619; County of Schuyler v. Thomas, 98 U. S. 169; County of Cass v. Gillett, 100 U. S. 585; Louisiana (City) v. Taylor, 105 U. S. 454; and County of Ralls v. Douglass, 105 U. S. 728; s. c., 7 Am. & Eng. R. R. 212. In the case last cited we referred to the previous cases, and to the cases in Missouri which they followed, and said:

"Such being the condition of the law on this subject down to April, 1878, we do not feel inclined to reconsider our former rulings, and follow the later decisions of the Supreme Court of the State in State v. Garroutte, 67 Mo. 445, and State v. Dallas County, 72 Mo. 329, where this whole line of cases was substantially overruled. The bonds involved in this suit were all in the hands of innocent holders when the law of the State was so materially altered by its courts. In our opinion the rights of the parties to this suit are to be determined by the 'law as it was judicially construed to be when the bonds in question were put on the market as commercial paper.' Douglass v. Pike County, 101 U. S. 677, 687."

From the views thus expressed we are not disposed to swerve.

One point taken in the present case may not have been presented in any of the cases cited, to wit, that the rights, privileges, and franchises of the Kansas City & Cameron R. R. Co. were not expressly declared to pass over to the company with which it might become consolidated, by the law authorizing such consolidation. This law was passed March 11, 1867, and declared as follows:

"It shall be lawful and competent for said company to make such arrangement with any other railroad company to furnish equipments and to run and manage its railroad as it may deem expedient and find necessary, or to lease the same, or to consolidate it with any other company upon such terms as may be deemed just and proper."

In the "finding of facts" made by the court, it is, amongst other things, found as follows:

"That under the provisions of an act of the general assembly of the State of Missouri, approved May 11th, 1867, entitled, etc., the said corporation, then known as the Kansas City & Cameron R. R. Co., on the 21st day of February, in the year 1870, was consolidated with the Hannibal & St. Joseph R. R. Co., and all the rights, privileges, franchises, and property of said Kansas City & Cameron R. R. Co. were, by said consolidation, transferred to the Hannibal & St. Joseph R. R. Co., which then and thereby became the owner of and possessed of the same."

If only a sale of the road to another company had been authorized and made, then it might very plausibly have been contended

that the purchasing company took and held it under its own charter only, without the franchises and privileges connected with it in the hands of the vendor company; but "consolidation" is not sale, and when two companies are authorized to consolidate their roads, it is to be presumed that the franchises and privileges of each continue to exist in respect to the several roads so consolidated. This point was considered in the case of Tomlinson *v.* Branch, 15 Wall. 460, and Branch *v.* City of Charleston, 92 U. S. 677, and was decided in accordance with this view. This being so, the authority given to consolidate, "upon such terms as may be deemed just and proper," would include the power to transfer to the consolidated company the franchises and privileges connected with the road, if the law itself did not have that effect; and the court has found that this was done. We think, therefore, that the point is not well taken.

The judgment of the circuit court is affirmed.

See Carroll Co. *v.* Smith, and note, supra.

City of Jonesboro
v.
Cairo and St. L. R. Co. and others.

(110 *United States Reports*, 192.)

Power given by charter to a city "to borrow money and issue bonds therefor" does not warrant the issue of bonds to pay for a subscription for railway stock.

Where a city voted to subscribe for railway stock when no authority existed for such action, *held*, that a general statute declaring all such elections theretofore held to be valid was sufficient to cure all defects.

After a city had thus acquired power to issue bonds, a constitutional provision was adopted prohibiting municipal subscriptions for stock, except where already authorized by vote "under existing laws." *Held*, that the power acquired by the city was within the exception, and remained intact.

The Illinois constitution of 1848 contained a clause to the effect that no private or local law should embrace more than one subject, and that this subject should be expressed in the title. An act entitled "An act to amend the charter of the Cairo & St. Louis R. R. Co.," embraced provisions legalizing invalid municipal elections previously held for the purpose of voting subscriptions to railway stock. *Held*, that the tenor of the act was sufficiently expressed in its title.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Wm. S. Day and Sidney Grear for appellant.

Geo. A. Sanders for appellees.

HARLAN, J.—This is an appeal from a decree in the circuit court of the United States for the Southern District of Illinois, dismissing a bill in equity filed by the city of Jonesboro, in that State, against the Cairo & St. Louis R. R. Co., an Illinois corporation, the auditor of State, the county clerk, and sheriff of Union County, Illinois, and the "unknown holders of the Jonesboro city bonds, issued in aid of the Cairo & St. Louis R. R. Co." The suit was commenced in one of the courts of the State. Its object was to obtain a decree perpetually enjoining the State and county officers, who were made defendants, from levying, certifying, and extending any tax for the payment either of the principal or interest of said bonds. There was no defence upon the part of those officers, and after publication against the "unknown holders" of the bonds in the mode prescribed by the local statute, a decree pro confesso was passed, giving the relief asked, and declaring the bonds invalid as against the city. Subsequently, Luther R. Graves, a citizen of Vermont, presented his petition, in conformity with the State law, alleging his ownership of some of the bonds, and asking that the default be set aside, with permission to him to plead, demur, or answer under the orders of the court. The petition was granted, and he was made a party defendant. Thereafter, on his further petition, the cause was removed to the court from whose decree this appeal is taken.

The evidence shows that on the second day of March, 1868, a resolution was passed by the city council of Jonesboro submitting to the legal voters of that municipality, at its then next regular election, held April 6, 1868, the question whether that city should, upon certain named conditions, subscribe $50,000 to the capital stock of the Cairo & St. Louis R. R. Co., payable in bonds within 20 years after date at the option of the city, with interest at the rate of 8 per cent per annum from date of issue. The election was held at the time indicated. Subsequently, by an act of the general assembly of Illinois, which became a law on March 3, 1869, entitled "An act to amend an act entitled 'An act to incorporate the Cairo & St. Louis R. R. Co.,'" approved February 16, 1865, authority was given to the several towns, cities, and counties through or near which that railroad might pass, and to the several townships in said counties which may have adopted, or might thereafter adopt, township organization, to subscribe for and take stock in the company, or to make a donation in aid of the construction of the road, and issue bonds for such subscriptions or donations, to be paid by taxation upon the property of the municipality issuing them. It was provided that no subscription or donation should be made, nor bonds issued, nor tax levied, unless a majority of the legal voters of the municipality, voting at an election called and held as provided in the act, should assent to the subscription or donation. But it was further provided in the same act "that all

elections heretofore had in any county, city, or town, in reference to a subscription to said railroad, are hereby declared legal and binding, and the county court of any county, and the corporate authorities of any city or town in which such elections have been already held, and a majority of the votes cast were for subscription, shall have authority to issue bonds for such an amount as was voted for, notwithstanding any insufficiency, informality, or irregularity in such election or in the notice thereof." 3 Priv. Laws, Ill. 1869, pp. 256–258.

By an ordinance of the city council of Jonesboro, passed July 21, 1871,—which referred to the resolutions of March 2, 1868, and recited that at the election of April 6, 1868, all the votes cast favored the subscription,—it was enacted that the proposed subscription of $50,000 "be and is hereby made upon the conditions specified in said resolutions," and that bonds be issued for the purpose of paying the same. The clerk was directed to have them prepared and delivered to John E. Naill, who by the ordinance was "appointed agent on behalf of the city to receive from the clerk the said bonds and to deliver the same to the said company, its authorized agent or officer, upon compliance by the said company with the conditions in said resolutions specified, and at the same time to receive from the said company its certificate or certificates of stock (paid up) in said company to an amount equal to the amount of the bonds so delivered, and that he immediately deliver such certificate or certificates to the city council." Under date of July 1, 1872, there was executed and delivered to Naill $25,000 of the bonds directed to be issued. They purport to have been issued by the city, were signed by its mayor and countersigned by its treasurer and clerk, and made payable to the railroad company or bearer at the Bank of Commerce in New York. Each one recites that "This bond is issued under and by virtue of the charter of said city, and of ordinances passed in pursuance thereof, in payment of so much of the subscription by said city for fifty shares of the capital stock of said Cairo & St. Louis R. R. Co. The proposition to subscribe for said stock having been first submitted, as required by law, to the qualified voters of said city for their approval or rejection, at a special election regularly held for that purpose at the various voting precincts or wards in and of said city, on the sixth day of April, A.D. 1868, and more than two thirds of said voters having at said election assented thereto, and said majority of voters also being a majority over all the votes cast at the last preceding regular election held in and for said city, and said Cairo & St. Louis R. R. Co. having duly performed all the conditions of said subscription to be performed on its part before said bond was to be issued."

On the thirteenth day of October, 1874, there was filed in the office of the auditor of State the official sworn certificate of the then mayor of Jonesboro (who as clerk had attested the bonds when

issued,) attested by the city clerk, to the effect that the beforementioned bonds, amounting to $25,000, were entitled to registration in the office of the auditor under the act of April 16, 1869, entitled "An act to fund and provide for paying the railroad debts of counties;" that they were issued by said city to said railroad company "under and by authority of the provisions of an act of the general assembly of Illinois, approved March 3, 1869, and by a vote of the people of said city at an election held on the 6th day of April, 1868." The certificate concluded: "And I, as mayor of said city, do hereby certify that all the preliminary conditions in the act in force April 16, 1869, required to be done to authorize the registration of these bonds, and to entitle them to the benefits of said act last referred to, have been fully complied with to the best of my knowledge and belief." On the day that certificate was filed, the auditor of State indorsed on each bond that it had been registered in his office pursuant to the provisions of the said act in force April 16, 1869. It was stipulated in the cause that the interest on the bonds so issued had been regularly paid by the city from date of their delivery to the issuing of the injunction by the State court in September, 1882.

It is entirely clear that when the vote of April 6, 1868, was taken, the city of Jonesboro was not authorized by its charter, or by any statute of Illinois, to make a subscription to the capital stock of the Cairo & St. Louis R. R. Co. The power given to its city council, "to borrow money on the credit of the city and issue their bonds under the seal of the city therefor," did not alone confer authority to subscribe to the stock of a railroad company, and issue bonds in payment thereof. The bonds upon their face showed that they were not issued for an ordinary municipal purpose. Lewis *v.* Shreveport, 108 U. S. 282; s. c., 12 Am. & Eng. R. R. Cas. 683.

But the act passed April 15, 1869, and which became a law on March 3, 1869, declared legal and binding all elections theretofore held in any county, city, or town, in reference to a subscription to the stock of the Cairo & St. Louis R. R. Co., and gave power to the county court of any county, and the corporate authorities of any city or town in which such elections had already been held, and a majority of the votes cast were for subscription, to issue bonds for the amount voted, "notwithstanding any insufficiency or informality or irregularity in such election, or in the notice thereof." The election of April 6, 1868, was something more than informal or irregular. It was insufficient, in itself, as authority for an issue of bonds. But its insufficiency was removed by the act of 1869, if the general assembly of Illinois had the power to do so. That it had such power cannot well be doubted. It has been frequently decided by the supreme court of that State—and upon

that point there has been no disagreement between that learned tribunal and the courts of the Union—that prior to the adoption of the Illinois constitution of 1870, an incorporated city, its corporate authorities being thereunto authorized by the legislature, could make a subscription to the capital stock of a railroad company without referring the question of subscription to a popular vote. Keithsburg *v.* Frick, 34 Ill. 405, 421; Q., M. & P. R. Co. *v.* Morris, 84 Ill. 410; Marshall *v.* Silliman, 61 Ill. 218, 225; Quincy *v.* Cooke, 107 U. S. 554; s. c., 12 Am. & Eng. R. R. Cas. 645. The legislature, therefore, could make the election of 1868 legal and binding as an expression of the popular will; and, upon the basis of the election thus legalized, empower or authorize the corporate authorities of the municipality to issue the bonds for the amount indicated by the popular vote. There is no question here, such as has arisen in some cases in the supreme court of Illinois and in this court, as to the power of the legislature, prior to the adoption of the constitution of 1870, to compel the corporate authorities of a municipality to issue bonds in aid of the construction of a railroad. While the act of 1869 legalized the election of 1868, it did not require an issue of bonds, but only gave power to the corporate authorities of the municipality to do so; such authorities, in the case of an incorporated city, being not the voters, but its mayor and council. Williams *v.* Town of Roberts, 88 Ill. 22; Quincy *v.* Cooke, supra. If the conditions attached to the subscription by popular vote, or by the ordinance of the city council of Jonesboro, had not been complied with when the curative act of 1869 was passed, then the railroad company would not have been entitled to have the bonds issued. This shows that the curative act does not belong to that class which the supreme court of the State has, in some cases, held to be beyond the constitutional power of the legislature to pass.

The next question to be considered is whether the constitution of Illinois adopted in 1870 took from the city of Jonesboro the power thereafter to issue the bonds voted by the election of 1868 and authorized by the act of 1869. That instrument declares that "no county, city, town, township, or other municipality shall ever become subscribers to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." We are of opinion that the right of the city to make the subscription in question, and to issue bonds in payment thereof, was saved by the proviso of that section. Before and at the time of the adoption of the constitution of 1870, the city, by its corporate authorities, had power to sub-

scribe to the stock of this railroad company. Power to that end was conferred by the act of 1869, which was itself based upon a vote of the people of Jonesboro. The vote, when taken, was, it is true, without legal sanction, but it was made effective as an expression of the popular will by the statute subsequently passed and in force before the constitution of 1870 was adopted. The phrase "under existing laws," in the section of the constitution referred to, relates, we think, to the time of the adoption of the constitution, rather than to the time when the vote of the people was in fact taken. Looking at the purpose of the proviso in the constitution of 1870, we cannot suppose that the framers of that instrument intended to make a difference, in the operation of that proviso, between a subscription authorized by a vote legally taken, and a subscription authorized by a vote taken without legislative authority, but subsequently, and before the constitution went into operation, legalized by a valid act of assembly.

But it is insisted that that part of the act of 1869 legalizing the election of 1868, and conferring authority to issue bonds for the amount voted at that election, was in violation of section 23 of article 3 of the Illinois constitution of 1848, which provides that "no private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title." The title of the act is "An act to amend the charter of the Cairo & St. Louis R. R. Co." The contention is that the legalization of an election previously held, and at which the people voted in favor of a subscription of stock to that company and the granting of authority to issue bonds in payment of such subscription, is not a subject expressed by the title of the act. In this view we do not concur, and our conclusion is justified by the later decisions of the supreme court of Illinois construing a similar provision in the State constitution of 1870. It was held in Johnson *v.* People, 83 Ill. 436, that the constitution "does not require that the subject of the bill must be specifically and exactly expressed in the title; hence we conclude that any expression in the title which calls attention to the subject of the bill, although in general terms, is all that is required." People *v.* Lowenthal, 93 Ill. 205. The authority of municipalities to make subscriptions in aid of the construction of railroads in Illinois has frequently, if not generally, been given in the charters of the respective railroad corporations. Whether a particular municipality has legislative authority for a subscription to the stock of a particular railroad company can be determined, ordinarily, by referring to the charter of that company. The general subject of municipal subscriptions to the stock of this particular company was, therefore, germane to and fairly embraced by the title of the act of 1869. Upon like grounds a provision in the same act legalizing a previous election at which the people voted in favor of a subscription, and giving authority

to issue bonds for the amount indicated by the popular vote, was sufficiently covered by a title showing that the act in question was amendatory of the original charter of the company; this, because the validity of bonds so issued would depend upon the existence of legislative authority to issue them, and the existence of such authority would ordinarily be ascertained by reference to the charter and amended charter of the railroad corporation. Our decision in Montclair *v.* Ramsdell, 107 U. S. 152; s. c., 12 Am. & Eng. R. R. Cas. 689, expresses substantially the same views, upon this general subject, as those announced by the supreme court of Illinois in Johnson *v.* People. We are of opinion that no error was committed in dismissing the bill, so far as it questioned the authority of the State officers to assess, levy, and extend taxes in payment of the bonds held by the appellee Graves.

The decree is consequently affirmed. It is so ordered.

Power to Issue Bonds must be Express.—In order to authorize a city to issue bonds in aid of railroads, express power to that effect must be conferred upon it by its charter. Penn. R. R. Co. *v.* Philadelphia, 47 Pa. St. 189; Marsh *v.* Fulton, 10 Wall. 676; Bridgeport *v.* Housatonic R. R. Co., 15 Conn. 475; St. Joe Township *v.* Rogers, 16 Wall. 644; English *v.* Chicot Co., 26 Ark. 454; McCoy *v.* Brant, 53 Cal. 247; Starin *v.* Genoa, 23 N. Y. 439; People *v.* Mitchell, 35 N. Y. 351; Wells *v.* Board of Supervisors, 2 Am. & Eng. R. R. Cas. 605; Hopper *v.* Covington, 4 Am. & Eng. R. R. Cas. 251; Lewis *v.* Shreveport, 12 Am. & Eng. R. R. Cas. 683; Taxpayers of Milan *v.* Tennessee, etc., R. Co., 11 Lea (Tenn.), 329.

Retroactive Statutes Validating Void Subscriptions.—In the absence of constitutional prohibition the legislature may by proper action validate municipal bonds theretofore issued without authority. Duanesburgh *v.* Jenkins, 57 N. Y. 177; Keithsburg *v.* Frick, 34 Ill. 405; Bass *v.* Columbus, 30 Ga. 845; Steines *v.* Franklin Co., 48 Mo. 167; Knapp *v.* Grant, 27 Wisc. 147; Bradley *v.* Franklin Co., 65 Mo. 638; Bissell *v.* Jeffersonville, 24 How. 287; Gelpcke *v.* Dubuque, 1 Wall. 220; Campbell *v.* Kenosha, 5 Wall. 194; City *v.* Lamson, 9 Wall. 477; Ritchie *v.* Franklin Co., 22 Wall. 67; Quincy *v.* Cooke, 12 Am. & Eng. R. R. Cas. 645; Lewis *v.* Shreveport, 12 Am. & Eng. R. R. Cas. 683; Otoe Co. *v.* Baldwin, 111 U. S. 1; s. c., supra, and note.

Retrospective Effect of Constitutional Provisions prohibiting Municipal Subscriptions.—See upon this subject Louisville *v.* Savings Bank, 104 U. S. 469; s. c., 112 Am. & Eng. R. R. Cas. 589, and note, where the authorities are collected. See Louisiana *v.* Taylor, 105 U. S. 454.

Howard County

v.

Paddock.

(110 *United States Reports*, 384.)

The Louisiana and Missouri Railroad, through Howard County, Missouri, was constructed under authority derived from the original charter granted in 1859, and the power conferred by that act upon the county to subscribe to the

capital stock of the railroad company without a vote of the people was not affected by the amendment to the Constitution in 1865.

John D. Stevenson for plaintiff in error.
John H. Overall for defendant in error.

WAITE, C. J.—It was conceded on the argument of this case that under the original charter of the Louisiana and Missouri River R. R. Co., granted in 1859, Howard County had authority to subscribe to the capital stock of the company without a vote of the people, and that this authority was not taken away by the Constitution of 1865. The claim is, however, that the amending act of 1868 so changed the original charter as to subject it to the prohibitions of the Constitution as to municipal subscriptions made after that act was passed and accepted by the company. As to this it is sufficient to say that in County of Callaway *v.* Foster, 93 U. S. 567, it was decided otherwise. By the act of 1868 power was given to build a branch through Callaway County, and to extend the road across the Missouri River, but no change was made in the direction of the main line. That was left to the discretion of the directors, who retained their original authority to build through Howard County on the way to the Missouri. The original authority of Howard County to subscribe to the stock was consequently unimpaired. The fact that the branch through Callaway County was located, and the subscription of that county received, before Howard County made its subscription, is unimportant in this case, because the line through Callaway County was located as a branch, while that through Howard County was designated in express terms as the main line. If either part of the road was built under new authority conferred on the company by the act of 1868, it certainly was not the main line as located. The power to build the main line was clearly conferred by the act of 1859.

It follows that the judgment of the Circuit Court was right, and it is consequently

Affirmed.

See City of Jonesboro *v.* Cairo & St. L. R. Co., 110 U. S. 192; s. c., supra, and note.

DALLAS COUNTY
v.
MCKENZIE.

(110 *United States Reports*, 686.)

Bonds issued by counties in the State of Missouri during the years 1870 and 1871 in payment of subscriptions to the stock of railroad companies without a vote of the people, are valid if the subscription was made under authority

granted before the adoption of the constitution of 1865, which did not require such a vote to be taken.

Municipal bonds are not invalid in the hands of a bona fide holder by reason of their having been voted and issued in excess of the statutory limit, if the recitals import a valid issue.

When the records of a county court show that orders for subscriptions to stock were made at adjourned and special terms at which all the judges were present, and that the last order was made at a regular term, it will be presumed, in the absence of anything to the contrary, that the adjourned and special terms were regularly called and held.

ACTION to recover amounts due on interest coupons of municipal bonds issued in payment of a subscription for $85,000 to railway stock. The bonds contained the following recital:

"This bond is issued pursuant to an order of the county court of the County of Dallas, made May 18, 1871, and amended on June 19, 1871, and on August 12, 1871."

There was no vote of the taxpayers of the county to authorize the subscription. The order of the County Court made on the 18th May, purported to be made at "an adjourned term." The record did not show how this became an adjourned term. It was assigned as error that "the Circuit Court erred in admitting in evidence the orders of the County Court of Dallas County over the objections of plaintiff in error."

John P. Ellis for plaintiff in error.

J. B. Henderson, Thomas C. Fletcher and Geo. D. Reynolds for defendant in error.

WAITE, C. J.—It is no longer an open question in this court that bonds issued by counties in Missouri, during the years 1870 and 1871, in payment of subscriptions to the stock of railroad companies without a vote of the people, are valid if the subscription was made under authority granted before the adoption of the Constitution of 1865, which did not require such a vote to be taken. In Ralls County *v.* Douglass, 105 U. S. 728; s. c., 7 Am. & Eng. R. R. Cas. 212, the cases in the Supreme Court of the State and in this court bearing on that question are referred to, and our conclusion distinctly stated. We there decline to follow the case of State *v.* Dallas County Court, 72 Mo. 329, decided in 1878, which substantially overruled a long line of cases in the Supreme Court of the State on which our earlier decisions were predicated.

In Marcy *v.* Township of Oswego, 92 U. S. 637, and Humboldt Township *v.* Long, Ib. 642, followed in Wilson *v.* Salamanca, 99 U. S. 499, it was expressly decided that municipal bonds were not invalid in the hands of a bona fide holder, by reason of their having been voted and issued in excess of the statutory limit, if the recitals imported a valid issue. It is an admitted fact in this case that McKenzie, the defendant in error, is a bona fide holder for value of the coupons sued on, and the recitals, which are almost in the exact lan-

guage of those in Wilson *v.* Salamanca, supra, imply authority for the issue of the bonds from which they were cut. Consequently, in this case, the excessive issue is no defence.

The records of the county court which were put in evidence show affirmatively that all the justices were present and acting at the adjourned and special terms, when the orders were made directing the subscription to the stock and providing as to the terms of the contract. The last order was made at a regular term. Under these circumstances, it is certainly to be presumed, in the absence of anything to the contrary, that the terms were regularly called and held. It was, therefore, not error to admit the records in evidence without proof of the order for the adjourned term, or the call for the special term. The fact that the order of the 7th of August, 1871, is referred to in the recitals of the bond as having been made on the 12th, is unimportant. Smith *v.* County of Clark, 54 Mo. 58.

The judgment is affirmed.

See City of Jonesboro *v.* Cairo & St. L. R. Co., 110 U. S. 192; s. c., supra, and note.

KNOX COUNTY COURT

v.

UNITED STATES ex rel.

(109 *United States Reports*, 229.)

Bonds of the kind involved in these suits are debts of the county. Holders are entitled to payment out of the general funds of the county raised by taxation for ordinary use, after exhausting the special fund.

WAITE, C. J.—In United States *v.* County of Clark, 96 U. S. 211, it was decided, at the October term, 1877, that bonds of the character of those involved in the present suits were debts of the county, and that for any balance remaining due on account of principal or interest after the application of the proceeds of the special tax of one twentieth of one per cent, the holders were entitled to payment out of the general funds of the county. This, we all agree, means that the payment of this balance is demandable out of funds raised by taxation for the ordinary county uses. The mandamus applied for in that case was one "requiring the county court and the justices thereof to direct the clerk of the county to draw a warrant on the county treasurer for the balance of the judgment remaining unpaid, so that he might be enabled, on its presentation, to have it paid in its order out of the county treasury," and there was no fund out of

which the payment could be made, except that raised by taxation for ordinary county uses. By the judgment of this court such a mandamus was awarded.

At the next term, in 1878, the point thus decided was explicitly stated in United States *v.* County of Macon, 99 U. S. 582, 589, and in Macon County *v.* Huidekoper, Id. 592, a majority of the court adhered to the decision and ordered judgment accordingly. It was conceded on the argument that all the judgments now under consideration must be affirmed unless these cases are overruled. This a majority of the court are unwilling to do, and judgments of of affirmance are, consequently, ordered.

BOARD CO. COMMISSIONERS OF THE COUNTY OF CHEROKEE *v.* WILSON.

(*Advance Case, Supreme Court of the U. S. December* 17, 1883.)

Under the several acts of the legislature of Kansas, providing for the payment of township bonds, the board of county commissioners of any county are not relieved, by a vacancy in the office of township trustee of any township therein, from the duty imposed upon them by the statute of levying and collecting taxes in such township, to meet its bonded indebtedness. The commissioners may be compelled by mandamus to perform their duty.

IN error to the Circuit Court of the United States for the District of Kansas.

Wallace Pratt for plaintiff in error.

Jas. S. Botsford and Jos. Shippen for defendant in error.

WAITE, C. J.—On the eleventh of June, 1881, William C. Wilson, the defendant in error, recovered a judgment in the circuit court of the United States for the district of Kansas, against the township of Salamanca, Cherokee county, for $48,920.31. At that time the office of trustee of the township was vacant, and it has not been filled since. On the twenty-fourth of July, 1882, Wilson sued out of the same court an alternative writ of mandamus, returnable on the ninth of October, 1882, requiring the board of county commissioners of the county "to forthwith levy upon the taxable property . . . in said township . . . a tax sufficient in amount for the payment of the judgment . . . and cause the same to be certified to the county clerk of said county," and requiring the clerk of the county "to extend said tax forthwith on the tax books of said county and deliver the same with said tax so levied and extended thereon to the county treasurer of said county;" and the county treasurer forthwith, after the tax books shall have been delivered

to him by the clerk, "to proceed to collect said taxes and pay the same, when so collected, to said William C. Wilson, in payment of said judgment, interest, and costs," or show cause why they had not so done. This writ was served on the individual members of the board of county commissioners, and on the clerk and treasurer of the county, on the twenty-sixth of July. On the twenty-seventh of November, 1882, the respondents filed a motion to quash the writ, and on this motion raised two questions, to wit: (1) Whether the writ was not sued out prematurely; and (2) whether, under the statutes of Kansas, the county commissioners could legally do that which the writ sought to coerce them into doing. Before this motion was disposed of the individual members of the board of county commissioners filed an answer, and, after the testimony was closed, Wilson moved for a peremptory writ. Upon the hearing of this motion and the motion to quash, the judges holding the court were divided in opinion on the following questions: (1) Whether said motions respectively should be sustained or overruled; (2) whether it is the legal duty of the board of county commissioners of Cherokee, under the statutes of the State of Kansas, to levy the tax as commanded by the alternative writ of mandamus herein, for the payment of the judgment of the relator against Salamanca township, in said county, based upon interest coupons detached from bonds issued by said township to pay shares of capital stock in a railroad company, which bonds were voted under the act of the general assembly of the State of Kansas, entitled "An act to enable municipal townships to subscribe for stock in any railroad and to provide payment of the same," approved February 25, 1870, and issued September 1, 1872, under the act of said general assembly, entitled "An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-powers, or other works of internal improvement, and providing for the registration of such bonds, and the repeal of all laws in conflict therewith," approved March 2, 1872.

The circuit judge was of opinion that the motion to quash should be overruled, and that for the peremptory writ granted. A judgment awarding the writ was thereupon entered, and the questions as to which the difference of opinion arose were duly certified. The case is now here on a writ of error for an answer to these questions.

The act of February 25, 1870, authorized the township to subscribe to the capital stock of the Memphis, Carthage & Northwestern Railroad Company, and to issue bonds to pay the subscription. That was settled by the judgment against the township, on account of which the mandamus is asked.

Every township in Kansas is a body corporate and politic. Section 1, (5965,) Dassler's Comp. Laws, 977. The trustee is the principal officer of the township, and his duty is, among other things,—

section 22, (5988,) Dassler's Comp. Laws, 980,—to "superintend all the pecuniary concerns of his township," and, at the July session of the board of county commissioners, annually, with the advice and consent of the board, to levy a tax on the property of the citizens of the township, for township, road, and other purposes, and report the same to the county clerk for entry on the tax roll, "but, in a failure of such trustee and commissioners to concur, then the board of county commissioners shall levy such township, road, and other taxes." The board of county commissioners are required by law to meet in regular session on the first Monday in July of each year. Section 13, (1397,) Dassler's Comp. Laws, 274. They must also meet on the first Monday in August in each year, to estimate and determine the amount of money to be raised by tax for all county purposes, and all other taxes which they shall be required by law to levy. Section 83, (5886,) Dassler's Comp. Laws, 956. The county clerk must make up the tax list immediately after the first Monday in August, and deliver it to the treasurer for collection on or before the first Monday in November. Section 84, Dassler's Comp. Laws.

Section 6 of the act of February 25, 1870, under which the bonds involved in this proceeding were issued, is as follows:

"Sec. 6. Whenever any bonds shall be issued in pursuance of the foregoing provision, it shall be the duty of the board of county commissioners annually to proceed to levy and collect a tax on all the taxable property in such township sufficient to pay the interest on such bonds as the same becomes due, and to create a sinking fund sufficient to pay said bonds at maturity; and such tax shall be collected in cash or the coupons of such bonds which may be due; and such tax shall be collected as county and township taxes are collected, and paid out by the treasurer, on presentation of the coupons or bonds, when due; and the county clerk, treasurer, and other officers who may be required to do any act under the foregoing provisions, shall be entitled to the same fees as are allowed by law for similar services, and liable to the same fines and penalties for non-compliance."

The act of March 2, 1872, referred to in the second question certified, was repealed, so far as it affects this case, by the act of March 9, 1874, (Sess. Laws 1874, p. 41,) sections 7 and 13 of which are as follows:

"Sec. 7. It shall be the duty of the proper officers of any county, city, or township, in which bonds have been heretofore voted for any of the purposes mentioned in the act to which this act is amendatory, annually, at the time when other taxes are levied, to levy and cause to be collected a sufficient tax to pay the interest on all such bonds as the same shall become due, and also for the purpose of creating a sinking fund for the final redemption of such bonds. . . .

"Sec. 13. It will be the duty of the board of county commissioners of any county in which railroad bonds shall be issued under the provisions of this act, annually, at the time when other taxes are levied, to levy and cause to be collected, as other taxes are levied and collected, a sufficient tax to pay the interest on all bonds issued for railroad purposes by such county, or any township therein, as the same falls due, and also for the purpose of creating a sinking fund for the final redemption of such bonds."

These statutes were in force when the alternative writ of mandamus was sued out in this case. The judgment against the township was rendered on the eleventh of June, 1881. It therefore became the duty of the proper officers to levy the tax at the time fixed by law for that purpose in the year 1881. No such levy was made, and, consequently, all officers whose duty it was to make the levy were in default when the alternative writ was sued out in 1882. It follows that the writ was not prematurely issued if it was the duty of the board of county commissioners to make the levy when there was no trustee of the township. The fact that the board may not have had actual notice of the rendition of the judgment until November, 1881, does not affect their legal obligation to make the levy. It may be accepted as an excuse for not performing that duty, but it does not relieve them from the consequences of their legal default.

The township trustee is in law the principal officer of the township. It is his duty to superintend all the pecuniary concerns of the township, and, with the advice and concurrence of the board of county commissioners, to levy all taxes required to meet the liabilities of the township not otherwise provided for by law; but, if he fails in this duty, the board must, as we think, make the necessary levies for him. To that extent the board is charged with the duty of caring for the interests of the township. Such is the fair meaning of section 22, (5988.) Under that section the township trustee is required to attend the meeting of the board in July of each year and lay before them his recommendations for taxes to be levied. As his levy can only be made with the concurrence of the board, there must necessarily be an inquiry by the board into the pecuniary concerns of the township, so as to determine whether what is recommended by the trustee is enough or more than enough to meet its liabilities for the current year. If the trustee has omitted a tax for any purpose, which the law requires to be levied, it is the clear duty of the board to make the levy themselves if the trustee will not. The trustee and the commissioners are made in law a tribunal to meet in July in each year to estimate and determine what taxes are required in the township for the year. If both the trustee and commissioners are present at the meeting and agree as to what should be done, the trustee reports the tax to the county clerk; but if the trustee is not present,

or being present does not agree with the commissioners, the opinion of the commissioners prevails, and they may proceed without him. This is the evident purpose of the provision that, "in failure of such trustee and commissioners to concur," the board shall make the levy. The tax to pay the judgment in this case was one of the taxes to be levied on the property of the township to pay a township debt. It is true that this section of the law was enacted in substance years before the bonds involved in this suit were issued, but unless it has been in some way superseded by reason of the special acts connected with the particular obligation of these bonds, it governs this case. So far as we are advised, if the tribunal, consisting of the trustee and county commissioners, are relieved from their general supervision of the needs of the township in the way of taxation for these bonds, it is only to put that duty on the board alone. If on the board, it was clearly their duty to levy the tax without the trustee at the meeting in August, 1881, because the legal liability of the township had then been judicially established. If, however, it was a matter in respect to which the trustee should act conjointly with them, both they and the trustee were in default in July, 1881. In any view of the case, the obligation to levy the tax had been imposed on the county commissioners when the alternative writ was sued out, and they have shown no good cause why the levy was not made.

The board of county commissioners have alone brought this writ of error. So far as appears, the clerk and treasurer are satisfied with what has been done in reference to them. The board are in no condition to complain for the other officers, because, under the law, they must levy the tax before the others can act, and, if the levy is made, the duties of the clerk and treasurer are purely ministerial. The whole proceeding depends on the duty of the board to levy the tax. We conclude, therefore, that the motion to quash should have been overruled, and the motion for judgment sustained. The first question is answered accordingly. The second question is answered in the affirmative.

As the judgment was in accordance with these answers it is affirmed.

Mandamus to Enforce Payment of Municipal Bonds.—A holder of municipal bonds may have a writ of mandamus directed to the proper municipal authorities ordering and directing them to levy the taxes necessary to pay the bonds.

Hopple *v.* Brown Township, 13 Ohio St. 311; Shelby Co. *v.* Cumberland & O. R. Co., 8 Bush. 209; Commonwealth *v.* Allegheny Co., 32 Pa. St. 218; Commonwealth *v.* Pittsburgh, 34 Pa. St. 496; McLendon *v.* Anson Co., 71 N. C. 38; Columbia Co. *v.* King, 13 Fla. 452; Greene Co. *v.* Daniel, 3 Am. & Eng. R. R. Cas. 105; State *v.* Rainey, 7 Am. & Eng. R. R. Cas. 183; Winter *v.* Montgomery, 7 Am. & Eng. R. R. Cas. 307; Decatur Co. *v.* Indiana, 12 Am. & Eng. R. R. Cas. 604; Wolff *v.* New Orleans, 12 Am. & Eng. R. R. Cas. 625.

LOUIS
v.
BROWN TOWNSHIP.

(110 *United States Reports*, 162.)

Defendants in error issued to A, their bonds with interest coupons attached. A indorsed to B, and B endorsed to the plaintiff after the bonds were overdue. While the bonds were in B's possession, overdue, B was party-defendant in a suit in chancery in a State court in which D, an owner of real estate alleged to be encumbered by a mortgage to secure payment of the bonds, sought to have them declared invalid; and party-plaintiff to a cross-bill in that suit in which it was sought to have the same bonds declared valid, and the mortgage foreclosed. In these proceedings the bonds were adjudged to be invalid for want of authority in the trustees to issue them. During the same period B, as holder of the bonds, applied to the State court for a writ of mandamus to compel the trustees of the township to levy a tax for payment of interest on the bonds. In this suit it was decided that the bonds were issued without legal authority. On these facts *held:*

That the general rule that a purchaser of overdue bonds, after judgment rendered that the bonds are void, is bound by that judgment, applies here.

That when a mandamus is refused on grounds that are conclusive against the right of the plaintiff to recover in any action whatever, the judgment is conclusive of that fact.

When a proceeding in mandamus is used as an action at law to recover money, it is subject to the principles which govern money actions.

The judgment of the State court that the bonds were void in the hands of B, is conclusive of that fact in the hands of his vendee and privy in action.

If the parties have had a hearing and an opportunity of asserting their rights, they are concluded by final decree so far as it affects rights presented to the court and passed upon, even though all were defendants in the suit, and as between them no issue was raised and no adverse proceedings had.

THE facts are fully stated in the opinion of the court.

Hoadly, Johnson and Colston for the plaintiff in error.

J. P. Jones and C. H. Scribner for the defendants in error.

MILLER, J.—This is an action on bonds and interest coupons thereto attached, signed by the trustees of Brown township, payable to the Springfield, Mt. Vernon & Pittsburgh R. R. Co., or its assigns, on the first day of October, 1871, and dated April 20th, 1853.

The plaintiff says she is the owner and holder of the bonds and coupons, and in explanation of her title alleges that "after execution and delivery of said note to said railroad company as aforesaid, and in the year 1854, the said railroad company did indorse and deliver said note and the coupons thereto attached to Brown, Collins and Brown, and that said Brown, Collins and Brown after-

wards indorsed and delivered said note and coupons to Richard B. Hopple, and Richard B. Hopple afterwards indorsed and delivered said note and coupons to the plaintiff, who now holds and owns the same."

The defendants for answer, among other matters, filed two pleas of a former adjudication, in which the bonds were declared to be void, and rely upon these in bar of the action.

The first of these pleas, called defence No. 3, sets out a suit by one Hiram Hipple, plaintiff, against the trustees of Brown township, Robert B. Hopple and others, in which he alleges himself to be the owner of real estate encumbered by a mortgage to secure the payment of the bonds on which the present suit is brought, and that said defendants, among whom was the Richard B. Hopple from whom plaintiff in this suit purchased the bonds aforesaid, asserted a claim to his land on account of said mortgage. The plea further alleges that the holders of the bonds, among whom was Richard B. Hopple, filed their answer and cross-bill alleging the bonds and mortgage to be valid, and pray that the bonds and mortgage might be declared to be valid, and for a decree of foreclosure of the mortgage, and that in said cross-bill said Richard B. Hopple set up as the foundation of his prayer for relief, his ownership of the identical bonds now set forth in this action. In the suit on the mortgage, which was finally appealed to the supreme court of the State, Hopple and the other bondholders failed, and were adjudged to pay costs, on the ground of the want of authority in the trustees of Brown township to issue the bonds. To this suit the trustees of Brown township and Richard B. Hopple and other bondholders were parties.

The second plea sets forth an application by Richard B. Hopple, in his right as owner of these bonds, for a writ of mandamus from the supreme court of Ohio, to compel the trustees of Brown township to levy a tax to pay the interest on said coupons. To the alternative writ the trustees answered, denying the validity of the bonds, and the court decided that the supposed bonds and coupons were issued without any legal authority, and without any authority to take stock in the railroad company to which they were delivered, and gave judgment for costs against said Hopple.

The plea also avers that said bonds were not transferred to Annie Louis, plaintiff, until long after said bonds and coupons were due.

To these pleas demurrers were filed, and the demurrers overruled, and plaintiff not desiring to reply or plead further, judgment was rendered for defendant.

The error assigned by plaintiff is the overruling of these demurrers.

We think the court was right, upon the plainest principles of jurisprudence.

The case is unembarrassed by the doctrine of bona fide purchaser of negotiable securities, because the bonds were overdue in the hands of Richard B. Hopple when the suit of Hipple against him and others to have them declared void was commenced. The bonds fell due October 1st, 1871, the suit was commenced October 18th of that year, and the cross-bill, in which Hopple sought to enforce the bonds, was commenced April 2d, 1872. The bonds were, therefore, past due during the whole period of that litigation in which they were adjudged to be void in his hands.

As regards the action of mandamus while the bonds were not overdue, at the time of the judgment against Mr. Hopple, the plea expressly avers that they were overdue when the plaintiff Louis became their owner, and as she alleges in her declaration that she bought them of Hopple, it follows that they remained in his hands from the date of the judgment on mandamus against him until they became past due. This follows also from the fact that he asserted ownership of them after they were due, in the cross-bill to Hipple's suit.

The plaintiff, therefore, holding under Hopple by a purchase made after the bonds were due, and after the judgment in which they were decided to be void in his hands, is bound by that judgment, unless something can be shown which takes the case out of the general rule.

In the mandamus case, the plaintiff was the owner of the bonds, and the present plaintiff is bound by the privity of a subsequent holder of them. The defendants in that case are the defendants in this, so that the action is now between parties on whom that judgment is binding.

The only objection made to this is that while the statute of Ohio makes a judgment on mandamus a bar to another civil action where the writ is granted, it does not so declare where it is refused. The words of the statute are not presented to us, nor any decision of the courts of that State cited to sustain the proposition.

It is easy to see why the statute should declare that where a party has had recovery of what he claims by a writ of mandamus, the other party should not also be harassed by another action for the same demand. But it would not follow that where a mandamus was refused on grounds which were conclusive against the right of plaintiff to recover in any action whatever, that the judgment would not be a protection when such other action was brought. Such was the case before us. The ground of the court's judgment in denying the mandamus was not left to inference, however strong that inference might be from the pleadings, as in the case of Block v. The Commissioners, 99 U. S. 686, but the court declared, in the case we are now considering, in positive terms, that: "The said supposed bonds or undertaking and cou-

pons in the writ mentioned, were issued by the defendants without any legal power or authority, . . . and without any legal power or authority to make said supposed subscription to the capital stock of the railroad company, and that said supposed subscriptions, and said supposed bonds and coupons, are for said reason absolutely void," and that defendants are not estopped to set up the invalidity of said instruments.

Here is not only a denial of the writ of mandamus, but an adjudication that in the hands of Hopple the bonds in suit were absolutely void.

This court has repeatedly held since Postmaster General Kendall's Case, 12 Pet. 524, 614, that the proceeding in mandamus is, when appropriate, an action at law to recover money, and is subject to the principles which govern said actions, and in the case of Block *v.* Commissioners, 99 U. S. 686, the denial of the writ is held to be conclusive in a subsequent action as to the invalidity of the bonds, though the fact that the decision in mandamus was based on that ground is inferred from the pleadings, and not from the express language of the judgment, as in the present case.

We are of opinion that the judgment of the supreme court of Ohio established the fact that the bonds and coupons were void in the hands of Hopple, and the judgment is conclusive of that fact against his vendee and privy in this action.

The same result must follow in the case of Hipple *v.* The Board of Trustees and Richard B. Hopple and others. It is argued, in avoidance of this conclusion, that the board of trustees and Hopple being both defendants to Hipple's bill, no adversary contention on the question of the validity of the bonds could have taken place between them.

But this view of the case ignores entirely the facts that Hopple, in filing his cross-bill seeking to establish the bonds as valid, became plaintiff, and made the trustees defendants, and in this manner raised the issue of their validity between himself and the trustees directly, and it was in express terms decided against him. His assignee of those bonds, in the present action against the same trustees, is clearly bound by that decision.

But if there had been no cross-bill, the fact that both Hopple and the trustees were placed as defendants in the suit of Hipple, does not impair the conclusive character of the decree in that case as between those parties. The present case is precisely analogous to that of Corcoran *v.* The Chesapeake and Ohio Canal Co., 94 U. S. 741, and we cannot better express our views of this case than by a quotation from the opinion in that:

"It is said that Corcoran and his co-trustees, the canal company and the State of Maryland, were all defendants to that suit, and that as between them no issue was raised by the pleadings on this

question, and no adversary proceedings were had. The answer is, that in chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree. It is to be observed, also, that the very object of that suit was to determine the order of the distribution of the net revenue of the canal company, and that the Corcoran trustees were made defendants for no other purpose than that they might be bound by that decree. And, lastly, as the decree did undoubtedly dispose of that question, its conclusiveness cannot now be assailed collaterally, on a question of pleading, when it is clear that the issue was fairly made and was argued by Corcoran's counsel, as is shown by the third head of their brief, made a part of this record by stipulation." And in conclusion the court say: "It seems to us very clear that the question we are now called on to decide has been already decided by a court of competent jurisdiction which had before it the parties to the present suit; that it was decided on an issue properly raised, to which issue both complainant and defendant here were parties, and in which the appellant here was actually heard by his own counsel; and that it, therefore, falls within the salutary rule of law which makes such a decision final and conclusive between the parties, and that none of the exceptions to that rule exist in this case."

We are of opinion that both demurrers were properly overruled, and

Affirm the judgment of the circuit court.

BERNARDS TOWNSHIP
v.
STEBBINS, Executor.

(109 *United States Reports*, 341.)

If commissioners, authorized by statute to subscribe in the corporate name of a town for stock in a railroad company, and, upon obtaining the consent of a certain majority of taxpayers, to issue bonds of the town under the hands and seals of the commissioners, and to sell the bonds and invest the proceeds of the sale in stock of the railroad company, which shall be held by the town with all the rights of other stockholders, issue, without obtaining the requisite consent of taxpayers, to the railroad company, in exchange for stock, such bonds signed by the commissioners, but on which the seals are omitted by oversight and mistake; and the town sets up the want of seals

in defence of an action at law afterwards brought against it by one who has purchased such bonds for value, in good faith, and without observing the omission, to recover interest on the bonds; a court of equity, at his suit, will decree that the bonds be held as valid as if actually sealed before being issued, and will restrain the setting up of the want of seals in the action at law.

A bill in equity in the Circuit Court of the United States against a town in one State by a citizen of another, for relief against the accidental omission of seals from bonds of the defendant, payable to bearer, and held by the plaintiff, some of which are owned by him, and others of which are owned in different amounts, part by citizens of the State in which the town is, and part by citizens of other States, and have been transferred to him by the real owners for the mere purpose of being sued, should be dismissed, under the act of March 3d, 1875, c. 137, § 5, so far as regards all bonds held by citizens of the same State as the defendant, and bonds held by a citizen of another State to a less amount than $500.

THE facts are fully stated in the opinion of the court.

Alvah A. Clark and Thos. N. McCarter for appellants Stebbins and Morrison and another.

H. C. Pitney for Stebbins, appellee.

Courtlandt Parker for appellees Morrison and another.

GRAY, J.—These are appeals by a township in New Jersey from decrees of the Circuit Court of the United States for the District of New Jersey, upon bills in equity by the appellees for relief against the accidental omission of seals on its bonds. The facts, appearing by the record, are as follows:

By the general laws of New Jersey, the inhabitants of each township in the State are a body politic and corporate, by the name of "The Inhabitants of the township of ——— in the county of ———." Rev. Stat. of N. J. of 1877, 1191.

On the 9th of April, 1868, the legislature of New Jersey passed a statute entitled "An Act to authorize certain towns in the counties of Somerset, Morris, Essex and Union to issue bonds and take stock in the Passaic Valley & Peapack R. R. Co.," the first section of which directed the circuit court of either of those counties, on the application of twelve or more freeholders and residents of any township therein, situated along the route of the railroad, to appoint three "commissioners for such township to carry into effect the purposes and provisions of this act." The next two sections are as follows:

"Sec. 2. It shall be lawful for said commissioners to borrow, on the faith and credit of their respective townships, such sum of money, not exceeding ten per centum of the valuation of the real estate and landed property of such township, to be ascertained by the assessment rolls thereof respectively for the year eighteen hundred and sixty-seven, for a term not exceeding twenty-five years, at a rate of interest not exceeding seven per centum per annum, payable semi-annually, and to execute bonds therefor,

under their hands and seals respectively; the bond so to be executed may be in such sums and payable at such times and places, as the said commissioners and their successors may deem expedient; but no such bond shall be negotiated or bonds issued by said commissioners of or for either of said townships, until the written consent shall have been obtained of the majority of the taxpayers of such township, or their legal representatives, appearing upon the last assessment roll, as shall represent a majority of the landed property of such township, including lands owned by non-residents, appearing upon the last assessment roll of such township; such consent shall state the amount of money authorized to be raised in such township, and that the same is to be invested in the stock of the said railroad company, and the signatures shall be proved by one or more of the commissioners; the fact that the persons signing such consent are a majority of the taxpayers of such township, and represent a majority of the real property of such township, shall be proved by the affidavit of the assessor of such township, indorsed upon or annexed to such written consent, and the assessor of such township is hereby required to perform such service; such consent and affidavit shall be filed in the office of the clerk of the county in which such township is situated, and a certified copy thereof in the town clerk's office of such township, and the same or a certified copy thereof shall be evidence of the facts therein contained, and received as evidence in any court in this State, and before any judge or justice thereof.

"Sec. 3. The said commissioners authorized by this act may, in their discretion, dispose of such bonds, or any part thereof, to such persons or corporations and upon such terms as they shall deem most advantageous for their said township, but not for less than par; and the money that shall be raised by any loan or sale of bonds shall be invested in the stock of said railroad company for the purpose of building the aforesaid railroad, and said money shall be applied and used in the construction of said railroad, its buildings, equipment and necessary appurtenances, and for no other purpose; the commissioners respectively, in the corporate name of each of their said townships, shall subscribe for and purchase stock in said railroad company, to the amount they may have severally borrowed as aforesaid; and by virtue of such subscription or purchase of stock, upon receiving certificates for the amount of said stock so subscribed for or purchased by them, the said townships shall acquire all the rights and privileges respectively of other stockholders of said company, and it shall be lawful for the commissioners provided for in this act, or either of them, with the consent of the others, or a majority of the said commissioners, to participate in and to act in all the regular and legally authorized meetings of the stockholders, and either of them may act as director of said company if he shall be duly elected as such."

By § 4, the commissioners were directed to report annually to the township committee the amount required for the next year to pay the interest or principal of the bonds, and to apply in payment thereof the dividends on the stock subscribed or purchased for the township; and any deficiency was to be assessed and levied upon the landed property of the township, like other taxes. By § 5, the railroad company might agree with the commissioners, "in behalf of their respective townships," to pay the interest accruing "on the bonds issued by such townships," for three years, or until the railroad should be completed and earning sufficient to pay dividends equal to the interest. By § 6, the commissioners might, after acquiring stock, exchange it for bonds issued, and cancel the bonds so received; or they might, with such consent as mentioned in § 2, sell the stock for cash at public sale, and apply the proceeds to the purchase or redemption of the bonds. And by § 7, at the end of twenty-five years, the sum due for principal and interest on the bonds, as reported by the commissioners, was to be assessed and levied on the landed property.

By § 9, the commissioners were required, before entering upon the discharge of their duties, to give a bond to the township, with sureties approved by the township committee or by the judge of the county court. By § 11, their pay and disbursements were to be "audited and paid by the township committee, the same as other township expenses." By § 12, the commissioners in each township were "to constitute a board to act for their said townships respectively." And by § 14, all bonds issued were required to be registered in the office of the county clerk, and the words "registered in the county clerk's office" to be printed or written across the face of each bond, attested by the signature of the county clerk, "and no bond shall be valid unless so registered."

Commissioners for the Township of Bernards in the county of Somerset were appointed, and gave bond to the township, according to §§ 1, 9. On the 17th of December, 1868, they filed in the county clerk's office the written consent of a number of taxpayers, not being a majority of all the taxpayers in the township, but being a majority in number and value of the owners of real estate therein; with an affidavit of one of the commissioners to the signatures; and an affidavit of the assessor that the signers were a majority of the taxpayers of the township and represented a majority of the real property of the township, and also that they were a majority of the taxpayers of the township appearing upon its assessment roll for 1867, or their legal representatives, and represented a majority of the landed property of the township appearing upon that assessment roll.

In the same month of December, 1868, the commissioners subscribed in behalf of the township for stock in the railroad company of the value of $127,000, which did not exceed 10 per cent

of the assessed valuation of the landed property of the township in 1867; and caused bonds of the township to an equal amount to be printed in the form hereinafter set forth; and made an arrangement with the railroad company to exchange the bonds of the township for stock in the company, and to deliver the bonds to the company in instalments, as calls for payments on subscriptions were made, and as the work on the railroad progressed. The railroad was afterwards built and put in operation through the town; and the commissioners issued to the railroad company, in exchange for stock, instruments to the amount aforesaid, in the form of bonds of the denominations of $1000, $500, and $100 respectively, signed by the commissioners, but not sealed, with interest coupons annexed. The form of the bonds and the coupons was as follows:

"No. UNITED STATES OF AMERICA. $500.

"TOWNSHIP OF BERNARDS, SOMERSET COUNTY, STATE OF NEW JERSEY.

"The Inhabitants of the Township of Bernards in the County of Somerset acknowledge themselves to owe to bearer five hundred dollars, which sum they promise to pay the holder hereof, at the American Exchange National Bank in the City of New York, twenty-three years after the date hereof, and interest thereon at the rate of seven per cent. per annum, payable semi-annually, on the first days of July and January in each year, until the said principal sum shall be paid, on the presentation of the annexed interest coupons at the said bank.

"This bond is one of a series of like tenor, amounting in the whole to the sum of one hundred and twenty-seven thousand dollars, issued on the faith and credit of said township in pursuance of an act entitled 'An act to authorize certain towns in the counties of Somerset, Morris, Essex, and Union to issue bonds and take Stock in the Passaic Valley and Peapack Railroad Company,' approved April 9, 1868.

"In testimony whereof the undersigned commissioners of the said Township of Bernards in the County of Somerset to carry into effect the purposes and provisions of the said act, duly appointed, commissioned, and sworn, have hereunto set our hands and seals the first day of January in the year of our Lord one thousand eight hundred and sixty-nine.

"JOHN H. ANDERSON,
"JOHN GUERIN,
"OLIVER R. STEELE,
"*Commissioners.*"

"Registered in the county clerk's office.

"WILLIAM ROSS, JR.,
"*County Clerk.*"

"$17.50. The Inhabitants of the Township of Bernards in the County of Somerset will pay the bearer, at the American Exchange National Bank in the City of New York, seventeen $\frac{50}{100}$ dollars on the first day of January, 1869, for six months interest on bond No.

"JOHN H. ANDERSON,
"JOHN GUERIN,
"OLIVER R. STEELE,
"*Commissioners.*"

One fifth of the whole amount of bonds was signed by the commissioners and delivered to the railroad company on the 16th of January, 1869, was registered on the 18th of the same month, and was afterwards put in circulation by the company. Upon a bill filed by certain taxpayers of an adjoining township in the spring of 1869, the Court of Chancery of New Jersey restrained the issue of like bonds, for want of the consent of a majority of all the taxpayers of the township. Lane *v.* Schomp, 5 C. E. Green, 82. The commissioners thereupon obtained, and filed in the county clerk's office on the 1st of September, 1869, the written consent of other taxpayers, which, with those whose consent had been previously filed, constituted a majority of all the taxpayers in the township, with similar affidavits of commissioner and assessor; and the remaining four fifths of the bonds were afterwards issued and registered, and put in circulation. Of the bonds in controversy, some were issued before, and some after the 1st of September, 1869.

The commissioners intended to issue, and supposed that they had issued, perfect bonds, and their failure to affix their seals to the bonds was by oversight and mistake. The bonds were purchased by the present owners in good faith, in open market, for the then market price of from eighty-five to a hundred cents on the dollar, and without observing that they had no seals.

Cyrus Curtiss, a citizen of New York (of whom the appellee in the first case is the executor), held and owned such bonds to the amount of $2000; and held like bonds to the amount of $3000, owned by other citizens of New York, in amounts varying from $1300 to $500 each, except that one owned only $200, and delivered by them to him solely for the purpose of bringing suit on the coupons; and also held coupons past due and unpaid upon like bonds to the amount of $18,600, owned by citizens of New Jersey, who had assigned those coupons to him for the sole purpose of collecting the amount thereof.

Thomas H. Morrison and Gardner S. Hutchinson, citizens of New York (the appellees in the second case), held and owned such bonds to the amount of $10,000; and also held like bonds to the amount of $12,000 owned by other persons, citizens of New

York or Pennsylvania, in amounts varying from $6000 to $500 each, as well as bonds to the amount of $5100 owned by citizens of New Jersey, all which bonds had been transferred to them by the owners for the mere purpose of collecting the unpaid coupons thereon."

In April, 1874, actions of debt were brought by Curtiss, and by Morrison and Hutchinson, against the township, in the circuit court of the United States for the district of New Jersey, to recover the amount of unpaid coupons for three years' interest on all the bonds so held by the plaintiffs; to which the township pleaded that the bonds were not sealed by the commissioners.

The plaintiffs in each of those actions thereupon, in the spring of 1876, after requesting the two surviving commissioners (the third having died meanwhile) to affix their seals to the bonds, which they declined to do unless by order of some court of competent jurisdiction, filed a bill in equity in the same court, praying for a reformation of the bonds; for an order that the surviving commissioners affix seals opposite the signatures; for a decree that the bonds should be deemed and taken to be as valid and effectual in law as if they had been in fact sealed by the commissioners before being issued; for a perpetual injunction against the setting up of the want of seals as a defence in the action already brought, or in any future action by the plaintiffs to recover principal or interest, due or to grow due, on the bonds; and for further relief. Demurrers to the bills were interposed and overruled; answers and replications were filed, and a hearing was had upon pleadings and proofs.

At the hearing, it was objected, in behalf of the township, that the plaintiffs, if entitled to any relief, could maintain their bills so far only as concerned the bonds that were both owned and held by them, and not as regarded the bonds owned by other persons. The court overruled the objection, and entered a final decree upon each bill that the bonds or writings in the nature of bonds therein described be held and deemed to be as valid and effectual in law as if they had been in fact sealed by the commissioners before being issued; and that the township be perpetually enjoined from setting up the want of seals in the action at law already brought, or in any action to be thereafter brought, upon any of these bonds or coupons. From those decrees the township has appealed to this court.

It was contended in behalf of the township that the bonds were void: First. Because they were not under the seals of the commissioners, as required by the statute. Second. Because the statute did not authorize the issue of bonds with annexed and detachable coupons not under seal. Third. Because the consent of the taxpayers to the borrowing of money and issue of the bonds was obtained by fraud. Fourth. Because the consent of a majority of all the taxpayers, as well as of those who represented a majority of

the landed property of the township, was not obtained before the subscription for stock and the issue of the bonds. Fifth. Because the bonds were issued by the commissioners directly to the railroad corporation in exchange for stock, instead of being sold or disposed of by the commissioners and the money thus obtained applied to the purchase of stock as required by the statute.

In dealing with these objections, it must be borne in mind that the cases before us are not actions at law upon the bonds or coupons, but bills in equity to restrain the township from setting up the want of seals in the actions at law heretofore brought by those plaintiffs against the township to recover the amount of the coupons; and the objections above recited are to be considered so far only as they affect the question whether the bills can be maintained.

It has been settled, upon fundamental principles of equity jurisprudence, by many precedents of high authority, that when the seal of a party, required to make an instrument valid and effectual at law, has been omitted by accident or mistake, a court of chancery, in order to carry out his intention, will, at the suit of those who are justly and equitably entitled to the benefit of the instrument, adjudge it to be as valid as if it had been sealed, and will grant relief accordingly, either by compelling the seal to be affixed, or by restraining the setting up of the want of it to defeat a recovery at law. Smith *v.* Aston, Freem. Ch. 308; s. c., Cas. temp. Finch, 273; Cockerell *v.* Cholmeley, 1 Russ. & Myl. 418, 424; Wadsworth *v.* Wendell, 5 Johns. Ch. 224; Montville *v.* Haughton, 7 Conn. 543; Rutland *v.* Paige, 24 Vt. 181. See also Wiser *v.* Blachly, 1 Johns. Ch. 607; Green *v.* Morris & Essex Railroad Co., 1 Beasley, 165, and 2 McCarter, 469; Druiff *v.* Parker, L. R. 5 Eq. 131.

By the necessary effect and the very terms of the statute of New Jersey of 1868, the money is borrowed on the credit of the township, the stock obtained by the disposal of the bonds belongs to the township, the bonds are issued on behalf of the township, and are the bonds of the township; and the commissioners, though not elected by the township, but otherwise appointed as provided by the statute, act in issuing the bonds, and in doing everything else that they are required by the statute to do, as the agents of the township. This view has been affirmed by the judgment of the Supreme Court of New Jersey, construing this very statute, in Morrison *v.* Bernards, 7 Vroom, 219, and by the judgment of this court upon the effect of a similar statute of New York, in Draper *v.* Springport, 104 U. S. 501; s. c., 5 Am. & Eng. R. R. Cas. 205.

In Draper *v.* Springport it was held that the mere fact that the commissioners had only signed, without sealing, the bonds, did not exempt the town from liability to a purchaser thereof in good faith

and for valuable consideration. And Mr. Justice Bradley, in delivering judgment, said:

"It is apparent from the law that the substantial thing authorized to be done on behalf of the town was to pledge the credit of the town in aid of the railroad company in the construction of its road, by subscribing to its capital stock, and issuing the obligations of the town in payment thereof. The technical form of the obligations was a matter of form rather than of substance. The issue of bonds under seal, as contradistinguished from bonds or obligations without a seal, was merely a directory requirement. The town, indeed, had no seal; and the individual seals of the commissioners would have had no legal efficacy; for the bonds were not their obligations, but the obligations of the town; and their seals could have added nothing to the solemnity of the instruments." "We cannot agree with the courts of the State that the form of a seal was an essential part of the transaction."

It was argued that the power conferred upon the commissioners to issue bonds was a statutory power, defects in the execution of which could not be supplied or relieved against in equity. There is much learning on this subject in the books. But Mr. Chance, upon a full review of the older cases, has clearly demonstrated that the true ground upon which equity grants relief is "the same as that on which it relieves against the want of livery, the want of enrolment, or any other ceremony required, either at common law or by statute, but considered as not meant to be positively essential. The main point to be ascertained, at least with reference to forms prescribed by act of Parliament, is whether the legislature has attached a decisive weight to the observance of the forms." Chance on Powers, § 2989. See also 2 Sugden on Powers (7th ed.) 125–129.

In Darlington v. Pulteney, Cowp. 260, 267, Lord Mansfield said that the reason why equity could not relieve from defects in the execution of statutory powers to make leases was, "that there is nothing to affect the conscience of the remainderman." And in De Riemer v. Cantillon, 4 Johns. Ch. 85, where a sheriff's deed of land sold by him on execution omitted, by mistake in the description, an important part of the estate advertised and intended to be sold and purchased, and the purchaser, with the consent of the judgment debtors, took possession of and improved the whole, and afterwards, at their request, sold it, and conveyed by a like description, all parties understanding and believing that the whole was included in both deeds, and the price paid by the second purchaser being estimated on this basis, Chancellor Kent, upon a bill in equity filed by the last purchaser against the debtors, restrained them from prosecuting suits brought against him for the recovery of the land not included in the description, and decreed that they should release it to him.

In the present case, the commissioners, in issuing the bonds, acted rather in the capacity of agents of the township than as donees of a statutory power in the ordinary sense; and the direction of the statute that the bonds should be under the seals, as well as the hands, of the commissioners, was declared by this court in Draper *v.* Springport, above cited, to be "a matter of form rather than of substance," "merely a directory requirement," and not "an essential part of the transaction." The bonds are in other respects in the form prescribed by the statute. The commissioners intended to issue them in behalf of the town, pursuant to the statute, and stated on the face of the bonds that they had done so, and that they had thereto set their hands and seals. The town received full consideration for the bonds, and the purchaser bought them in open market, in good faith and for value, and in ignorance of the want of seals. These facts present a strong case for the interposition of a court of equity, having jurisdiction of the cause and of the parties, to prevent the formal defect of the want of the seals of the commissioners from being set up to defeat an action at law upon the bonds or coupons. The mere fact that the purchasers, at the time of their purchase, did not observe the omission of seals upon securities having in all other respects the appearance of municipal bonds, is not such negligence as should prevent them from applying to a court of equity to correct a mistake of this character. See Wadsworth *v.* Wendell and Montville *v.* Haughton, above cited; Harris *v.* Pepperell, L. R. 5 Eq. 1; Elliott *v.* Sackett, 108 U. S.

The objection that the statute did not authorize the bonds to be issued with coupons, if it is of any validity (which we do not intimate), will be fully open to the defendant in the actions at law upon the coupons.

The suggestion that the consent of the taxpayers to the issue of the bonds was obtained by fraud is not supported by the evidence.

The consent of a majority of all the taxpayers of the township has been held necessary by the court of chancery and by the Supreme Court of New Jersey. The chancellor, in granting an injunction against the issue of bonds without such consent, expressed the opinion that the want of such consent would afford no defence at law after the bonds had been once issued, and had come into the hands of innocent holders for value. The supreme court decided otherwise. Lane *v.* Schomp, 5 C. E. Green, 82; Morrison *v.* Bernards, 7 Vroom, 219. The question has not, so far as we are informed, been passed upon by the court of errors.

The exchange of the bonds directly for railroad stock would seem, in the absence of any decision in the courts of the State upon the point, to be a substantial compliance with the statute, or, at the most, a matter which would not defeat the rights of a bona fide purchaser. See Scipio *v.* Wright, 101 U. S. 665; Montclair *v.*

Ramsdell, 107 U. S. 147, 160; s. c., 12 Am. & Eng. R. R. Cas. 689.

But if either the want of a written consent of a majority of all the taxpayers, or the fact that the bonds were issued directly in exchange for stock, is a fatal objection as against a purchaser for value and in good faith, it may be availed of by the township in the actions at law on the coupons. If these objections are not of that character, they do not impair the equity of the purchasers to relief against the accidental omission of the seals of the commissioners. The validity of both these objections, therefore, may be more appropriately determined in the actions at law.

The remaining question argued at the bar is how far the citizenship of the real parties in interest, and the amount of the claim of each, should affect the exercise of jurisdiction and the extent of the decree.

The position of the plaintiffs is, that the bonds and coupons being payable to bearer, they are entitled to sue, at law or in equity, on all the coupons held by them; that the combination of the holders of several claims of moderate amount against the same defendant, for the purpose of diminishing and sharing the expense of litigation, was entirely proper, and should be encouraged by the court; that the bonds and coupons owned as well as held by the plaintiffs, and by others not citizens of New Jersey, clearly brought the case within the jurisdiction of the court; and that to deny to citizens of New Jersey the right to transfer their claims to the plaintiffs for the purpose of collection in the same suit, would be to discriminate unjustly between the citizens of New Jersey and the citizens of other States.

But, in the matter of the jurisdiction of the federal courts, the discrimination between suits between citizens of the same State and suits between citizens of different States is established by the Constitution and laws of the United States. And it has been the constant effort of Congress and of this court to prevent this discrimination from being evaded by bringing into the federal courts controversies between citizens of the same State.

In the Judiciary Act of 1789, the only express provision to this end was that the circuit court should not "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." Stat. September 24th, 1879, c. 20, § 11; 1 Stat. 78; Rev. Stat. § 629, cl. 1. That provision has been held not to be restricted to actions at law, but to include bills in equity to foreclose mortgages, or to compel the specific performance or enforce the stipulations of contracts. Sheldon v. Sill, 8 How. 441; Corbin v. Black Hawk County, 105 U. S. 659.

In Barney *v.* Baltimore, 6 Wall. 280, a bill in equity for the partition of real estate and for an account of rents and profits, in the Circuit Court of the United States for the District of Maryland, by a citizen of Delaware, owning a share in the estate, against citizens of Maryland, owning other shares therein, and to whom the owners of the remaining shares, being citizens of the District of Columbia, and not of any State, and therefore not authorized to sue in the Circuit Court of the United States, had conveyed their shares without consideration, under an agreement to reconvey upon request, and for the sole purpose of giving jurisdiction to the federal courts, was dismissed, because the grantors were necessary parties to the suit, and because their conveyance, not transferring their real interests to the other parties, was a fraud upon the court.

The Act of March 3d, 1875, c. 137, § 5, directs that if "in any suit commenced in a circuit court," it shall appear to the satisfaction of the court, "at any time after such suit has been brought," "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable" by the circuit court, that court "shall proceed no further therein, but shall dismiss the suit," and shall make such order as to costs as shall be just; and its order of dismissal shall be reviewable in this court on writ of error or appeal. 18 Stat. pt. 3, 470.

In Williams *v.* Nottawa, 104 U. S. 209, decided by this court since the hearing of these cases in the circuit court, an action was brought by Williams, a citizen of Indiana, in the Circuit Court of the United States for the Western District of Michigan, against a township in that State and district, upon its bonds payable to bearer. The action, as the record on file shows, was brought in September, 1874, about six months before the passage of the act of 1875. It appeared that Williams personally owned only three of the bonds, of $100 each, and that the other bonds in suit had been transferred to him solely for the purpose of collection with his own, by the owners thereof, all of whom were citizens of Michigan, except one Tobey, whose bonds amounted to $300 only, and whose citizenship was not disclosed by the record. The circuit court gave judgment for the plaintiff for the amount of the bonds belonging to Williams and to Tobey, and in favor of the township for the remainder. Upon a writ of error sued out by Williams to reverse the judgment in favor of the township, this court held that, in obedience to the act of 1875, the action should be wholly dismissed; because, so far as concerned the bonds owned by citizens of Michigan, who could not sue a Michigan township in the courts of the United States, it could not be doubted that the trans-

fer to the plaintiff, being colorable only, and never intended to change the ownership, was made for the purpose of "creating a cause cognizable in the courts of the United States;" and, as to the bonds owned by Williams and by Tobey, there was a collusive joinder, because, when the suit was begun, the amount due to each was less than $500, and therefore insufficient to maintain a suit in the federal courts.

The decision in Williams v. Nottawa establishes that the Circuit Court of the United States cannot, since the act of 1875, entertain a suit upon municipal bonds payable to bearer, the real owners of which have transferred them to the plaintiffs of record for the sole purpose of suing thereon in the courts of the United States for the benefit of such owners, who could not have sued there in their own names, either by reason of their being citizens of the same State as the defendant, or by reason of the insufficient value of their claims. The principle of that decision is equally applicable to suits in equity to assert equitable rights under such bonds.

It was argued that these bills in equity were only auxiliary to the actions at law, which were brought before the passage of the act of 1875, and therefore that act had no application. The answer to this is twofold. First. The bills in equity, filed since the passage of the act, are independent suits, of broader aim than the actions at law. The actions at law are to recover the amount of coupons only; the bills in equity seek, not merely an injunction against setting up the defence of want of seals in the pending actions on the coupons, but also a decree declaring that the bonds shall be deemed valid. Second. Even the actions at law, brought before the passage of the act of 1875, are subject, under the adjudication in Williams v. Nottawa, to be dismissed, in whole or in part, as the facts may require, in the court in which they are pending.

It follows, that these bills should have been dismissed, so far as regarded the bond for $200, owned by a citizen of New York in the first case, and also as to all the bonds owned by citizens of New Jersey in either case. But no valid objection has been shown to the maintenance of these bills, so far as regards those bonds of which the plaintiffs are the bearers, and which are actually owned, either by themselves, or by other citizens of New York or Pennsylvania, to a sufficient amount by each owner to sustain the jurisdiction of the circuit court. Thompson v. Perrine, 106 U. S. 589; s. c., 3 Am. & Eng. R. R. Cas. 140; Chickaming v. Carpenter, 106 U. S. 663; Douglas' Commmissioners v. Bolles, 94 U. S. 104, 109; Cromwell v. Sac County, 94 U. S. 351, 360. The decrees of the circuit court must be modified accordingly.

The decrees in favor of the appellees being reversed as to a large part of their claims, they should pay costs in this court; but as

they still maintain their bills as to the rest of their claims, they should recover costs in the court below.

The decrees of the circuit court are reversed, and the cases remanded with directions to enter

Decrees in conformity with this opinion.

HAY

v.

ALEXANDRIA AND W. R. CO., et al.

(*Advance Case U. S. Circuit Court E. D. Virginia.* 1884.)

A railroad corporation executes a trust deed, giving preference to one of its directors over other creditors, and this deed is acknowledged before, and certified by, that director for registration, as a notary public. The court of highest resort of the State in which this deed is recorded pronounced that it does not create a lien upon the property conveyed, because of its defective registration. The validity of this registration is afterwards assailed in a federal court, which *held* that it would not reopen the question of registration and would treat the registration as null.

The charter of a city prohibits its councils from increasing its public debt unless authorized by two-thirds of its qualified voters. A deed is executed by a railroad corporation securing bonds proposed to be issued, and the city guarantees to the bondholders the payment of the bonds, without being authorized by a two thirds vote, and afterwards, when the bonds mature, pays the bonds and becomes the holder of them. In a subsequent litigation between the city and other lien creditors of the railroad corporation, the court of highest resort of the State in which the railroad lies and in which the railroad company is chartered, decrees that the deed is a lien upon the railroad notwithstanding the aforesaid inhibition in the city charter. In a still later litigation between lien creditors of the railroad corporation in a federal court, that court *held* that the decision of the State appellate court on this point was one that it was proper to follow, and, moreover, that although the city might have contested her liability to pay the bonds, yet that subsequent lienholders were in no condition to make such a contest, the debt being due, the lien being valid, and it being immaterial to them who gets the amount due.

Four State court judgments against a railroad corporation are assigned to Hay, a non-resident of the State. The plaintiffs in two of them are non-residents, and those in the two others are residents. These four judgments, after being assigned to Hay, are by him marked "satisfied," for a consideration which turns out to be null and void. An equity suit is brought by Hay in the federal court of that State to set aside the satisfactions and restore the liens of the original judgments and decree was entered according to the prayer of the bill. In a subsequent creditors' suit to settle liens and priorities, it was contended that this decree was defective for want of jurisdiction in the federal court to entertain the suit as to the two judgments that had been recovered by residents, the second clause of section first of the judiciary act of 1875 denying jurisdiction of the suit of an assignee of a chose in action, where the assignor could not sue, *held*, that the satisfactions were marked on the judgments by Hay, on an implied undertaking of the railroad

company to make the judgments good if the consideration of marking them satisfied was null and void; that this obligation was to Hay himself and was the real cause of action in the equity suit, and therefore that the second clause of the act of 1875 did not apply. Moreover, that in any event the controversies represented by the two judgments between citizens of different States gave jurisdiction of the suit in equity which comprehended the four judgments, and the federal court had a right to decree as to all four judgments, unless it had been shown that the judgments had been assigned for the purpose of creating jurisdiction as prohibited by section 5 of the act of 1875.

The statute law of Virginia provides that judgments may be kept alive in the following manner: Execution may be issued within a year and scire facias or action may be brought within 10 years; and where execution issues within the year, other execution may issue, or scire facias or action be brought within 10 years from the return-day where there is no return, or within 20 years from the return of an execution where there is a return. Accordingly, on judgments obtained in 1860, on which execution had been issued and returned within a year, actions were brought in 1875 and new judgments obtained, and it was contended that the old judgments were merged in the new; that the liens of the old were lost, and that the liens of the new dated only from the dates of the new judgments, and took priority only as of the later dates. But the court *held* that whatever may be the law as to merger in other jurisdictions, yet if the methods prescribed by the statute law of a State for preserving judgments and their liens are pursued, the doctrines of merger must not be applied in that State in such manner as to defeat the purpose of the law and to destroy priorities expressly intended to be preserved.

IN Equity.

The Alexandria & Washington R. R. Co. extends from Alexandria to the south end of Long Bridge, opposite Washington City, on the Potomac river. It is less than four miles long, but it is the important link which connects all railroads north with all railroads south of the Potomac river, which lie east of the Blue Ridge mountains. The width of ground originally condemned for its construction was 50 feet. Its original track was laid on the east side of this strip of land. It lies wholly in the county of Alexandria, Virginia. The company owning it was chartered on February 27, 1854. Acts Assembly Va. 1853–54, c. 63, p. 41. Its financial condition has always been exceptionally feeble, and its affairs and transactions have been the subject of varied and continued litigation in all courts in which they were cognizable. On the nineteenth of April, 1855, this company, having determined to issue bonds for raising money with which to build and equip its road; and the city of Washington having agreed to guarantee the payment of a portion of the bonds, the company executed a trust deed conveying its franchises, road, and property to J. H. and A. T. Bradley as trustees, for the purpose of securing the city in its guarantee. Owing to some imperfection in this deed a second one ratifying and confirming it was executed on the tenth of July, 1857, and recorded in the Alexandria county court on the twenty-third of July, 1857. The guarantee of the city of Wash-

ington was given by authority of an act of its board of aldermen and board of common council passed February 8, 1855, expressly conferring it. It is averred in the briefs of counsel that this act of the Washington councils was ultra vires, inasmuch as the charter of the city then in force (that of May 17, 1848), in its tenth section contains the following conditional provision:

"The corporation shall not have power to increase the present funded debt of the corporation either by borrowing money or otherwise, unless it shall be agreed to do so by two thirds of the legal voters of the said city at an annual election."

No such vote was ever taken. Some years after this guarantee was given, when the bonds matured for payment, the corporation of Washington paid them, principal and interest, and now holds them, having cancelled and cut out its own signature to the bonds.

On the thirty-first of December, 1856, the Alexandria & Washington R. R. Co. executed to I. L. Kinzer, as trustee, a trust deed conveying all its works and property to secure a bond of some $15,000 to the holders thereof who were the firm in Alexandria of Fowle, Snowden & Co. This deed was recorded on the third of April, 1857, nearly four months in advance of the Bradley deed. It was acknowledged before and certified by William H. Fowle, as notary public, who was one of the directors of the company and a member of the firm of Fowle, Snowden & Co. Walter Lennox, hereafter to be mentioned, was also a director of the company and was present at the execution of the Kinzer deed. Both Fowle and Lennox, as well as Snowden, of the firm of Fowle, Snowden & Co., had been directors of the company at, and cognizant of, the execution of the previous deed of the company to the Bradleys, for the benefit of the city of Washington. On the sixteenth of July, 1857, the company executed to Walter Lennox, as trustee, a deed conveying its railroad, franchises, property, rights, and privileges in trust to secure thirty bonds of a thousand dollars each, with interest, to their holders. This deed was duly recorded on the twenty-fourth of July, 1857. None of the foregoing deeds conveyed the income of the Alexandria & Washington Co. from its road. A provision of the statute law of Virginia respecting deeds, is as follows:

"Every deed of trust conveying real estate shall be void as to creditors (with or without notice), and subsequent purchasers for valuable consideration without notice, until and except from the time it is duly admitted to record in the county or corporation wherein the property embraced in such contract may lie." Code 1873, c. 114, § 5, p. 89.

At several dates, about the period of the execution of these deeds, judgments were recorded in the circuit court of Alexandria county (one judgment in the county court of that county), against the Alexandria & Washington R. R. Co., viz.: One on the twen-

ty-fifth of November, 1857, for $6706.70; two on the twenty-seventh of May, 1859, for $437.17 and $2410.87; the term of the court rendering these having commenced on the sixteenth of May, 1859; one on the ninth of February, 1858, for $1243.64; one on the twenty-first of March, 1860, for $1000; one on the twenty-first of February, 1860, for $16,606.87; and a seventh on the twenty-first of February, 1860, for $2260.04,—all with interest and costs. The two first named of these judgments were obtained by non-residents of Virginia, and the second and third of them, by residents of Virginia. These four first-named judgments were assigned as judgments, by the judgment creditors, to Alexander Hay, the complainant in this suit. In the three cases last named, the causes of action had been assigned to Hay before suit, and judgments had been obtained on them by Hay as assignee. Executions were taken out promptly on the first five of these judgments, and returns duly made on them. The other two were docketed, and so were some of the first five judgments. The first four of these judgments were marked "satisfied" on the thirtieth of November, 1865, under written authority from Hay, dated November 23, 1859.

The statute law of Virginia provides, in respect to judgments, substantially, that,—

Sec. 6. "Every judgment for money rendered in this State against any person shall be a lien on all the real estate of such person as of the date of such judgment; or, if rendered in court, as of the day of the commencement of the term at which it was rendered."

Except—

Sec. 8. That "it shall not be a lien on real estate as against a purchaser for valuable consideration without notice, unless it be docketed on the judgment docket of the county court of the county where the land lies, either within sixty days next after the date of such judgment, or fifteen days before the conveyance of said estate to such purchaser." Code Va. 1873, c. 182, §§ 6, 8, p. 1166.

As this law stood in the period 1855 to 1860, the time mentioned in the last lines quoted was, "within a year next after the date of such judgment, or ninety days before the conveyance," etc.

Section 9 of the same chapter provides:

"The lien of a judgment may always be enforced in a court of equity. If it appears to such court that the rents and profits of the real estate subject to the lien will not satisfy the judgment in five years, the court may decree the said estate, or any part thereof, to be sold," etc.

Section 12 provides that—

"On a judgment, execution may be issued within a year, and a scire facias or action may be brought within ten years after the

date of the judgment; and where execution issues within the year, other execution may be issued, or a scire facias or action may be brought within ten years from the return-day of an execution on which there is no return of an officer, or within twenty years from the return of an execution on which there is such return; provided, that in computing time under this section, there shall, as to writs of scire facias, be omitted from such computation, the time elapsed between the first day of January, 1869, and the passage of this act; [viz.: March 28, 1871.]

In 1875 Alexander Hay brought a suit in this, the United States circuit court for the eastern district of Virginia, at Alexandria, on the equity side, setting out that the consideration had failed, for which he marked as satisfied, the four first-named of his judgments that have heretofore been described; and praying that the "satisfactions" on them should be set aside, and the judgments reinstated with all liens attaining to them at the date of the satisfactions. This suit went on until January, 1881, when a decree was rendered in conformity with the prayer of the bill, from which no appeal has ever been taken. In the same year Hay brought a suit on the common-law side of this court, against the Alexandria & Washington Co., based on the three last-named judgments in his favor which have heretofore been described, and recovered a verdict and judgment anew on the three old judgments.

On the third of February, 1864, the general assembly of Virginia (that which sat at Alexandria) incorporated the Alexandria & Fredericksburg Ry. Co., with authority to construct a railroad from Alexandria to the vicinity of Fredericksburg. Acts 1863–64, c. 17, p. 20. That charter lapsed, but was revived by the general assembly on the fourth of June, 1870, by an act which empowered the company to extend its road to a point on the Potomac river between Alexandria and Washington city, or opposite Washington city, to connect with the bridge of any railroad company chartered by congress, whose road passes, or shall pass, through the District of Columbia. Acts, 1869–70, c. 145, p. 188. This act contained this proviso: "That, in the extension of said railway it shall in no way interfere with the chartered rights or franchises of any railroad extending between Alexandria and Washington," etc. This act virtually gave authority to the Alexandria & Fredericksburg Co. to run a road parallel with that of the Alexandria & Washington Co. between Alexandria and the south end of the Long Bridge. The Alexandria & Fredericksburg Co. soon acquired the property of the Alexandria & Washington Turnpike Co., whose turnpike road runs alongside of the Alexandria & Washington Railroad, its whole length. Instead of determining to lay its track wholly on the turnpike road, the Alexandria & Fredericksburg Co. instituted proceedings, on the sixth of February, 1871, in the county court of Alexandria county, for condemning

to its use a strip of land 18½ feet in width, taken from the west side of the 50-feet strip of the Alexandria & Washington Railroad. Under these proceedings, which were vigorously opposed by certain private persons and by James S. French, a stockholder in, and the former president of, the Alexandria & Washington R. R. Co., this 18½-feet strip of land was finally assessed by commissioners at the value of $407.81, the report of which was confirmed by the court by an order of June 2, 1873, and the amount assessed was paid into court by the Alexandria & Fredericksburg Co. These proceedings do not seem to have been resisted by the officers of the Alexandria & Washington R. R. Co., but were nevertheless strenuously resisted, and delayed for more than two years, as before stated.

The statute law of Virginia provides that upon such judgment as that just described, confirming an assessment, the title to that part of the land for which such compensation is allowed, shall be absolutely vested in the company in fee-simple. Code 1873, c. 56, § 11, p. 538. The Alexandria & Fredericksburg Co. at once took possession of the strip of land referred to, and in due course of time laid down a steel rail track upon it at an original cost of $59,610.37. It may be added here, that, after a considerable flood in the Potomac in the winter of 1881, repairs were put by this company on the whole 50-feet strip of land, including the tracks of both companies, at an outlay of $11,912.89, and that it has also, since 1870, paid taxes upon this property of the two companies to the amount of $1384.57.

The proceedings of condemnation which have been mentioned were made the subject of an appeal to the circuit court of Alexandria county, which terminated on May 23, 1879, in a decree declaring the proceedings illegal, and, of course, invalidating the title of the Alexandria & Fredericksburg Co. to the 18½-feet strip of land on which it had constructed its road. The ground of this decree of the circuit court was that the condemnation had been in violation of the proviso in the amended charter of the Alexandria & Fredericksburg Co. which has been quoted, prohibiting the Alexandria & Fredericksburg Co. from interfering with the chartered rights and franchises of the Alexandria & Washington R. R. Co. A majority of the capital stock of the Alexandria & Washington Co. was acquired by the Pennsylvania R. R. Co. on the twenty-third of April, 1872. That company held a controlling interest in the Alexandria & Fredericksburg Co. from the time it was organized. It also has held a controlling interest in the Baltimore & Potomac Co., whose road extends from Baltimore to Washington, and through Washington to the southern end of the railroad bridge crossing the Potomac at Washington. The decree of the circuit court of Alexandria county invalidating the proceedings in the county court for

the condemnation of the 18½-feet strip of land which has been mentioned, was itself made the subject of an appeal to the supreme court of appeals of Virginia, which latter court, on the twenty-fourth of November, 1881, affirmed the decree of the circuit court, and finally invalidated the title of the Alexandria & Fredericksburg Co. to the strip of 18½ feet of land in controversy; the Alexandria & Fredericksburg Co. having held this strip of land for about nine years under color of title, and put improvements on it, as has been stated, to the value of upwards of $70,000. The statute law of Virginia provides on this subject, substantially, that, where a jury shall be satisfied that a defendant against whom a decree or judgment shall be rendered for land, made on the premises at a time when there was reason to believe the title good under which he was holding permanent and valuable improvements, they shall estimate in his favor the value of such improvements as were so made before notice in writing of the title under which the plaintiff claims, not exceeding the amount to which the value of the premises is actually increased thereby at the time of the assessment. Code 1873, c. 432, §§ 1, 4, p. 964. Other sections provide that rents for five years are to be credited to the plaintiff, and for other adjustments.

It is not shown that either the Bradleys, or Lennox, or Kinzer, or any of the beneficiaries of the deeds which they represent took any part in resisting the condemnation of the strip of land which was taken and improved by the Alexandria & Fredericksburg Co., or ever gave "notice in writing" to that company of the liens which they held on the Alexandria & Washington Railroad, or made objection, or gave warning in any way against the construction of improvements upon the property which was subject to their liens. It is physically certain, from the conspicuous site of the road in relation to the residences of the trustees and a large portion of the beneficiaries in the deeds, that they must have had actual personal notice of these improvements during all the stages of their progress. In November, 1857, Kinzer, the trustee heretofore mentioned, advertised the property of the Alexandria & Washington R. R. Co. for sale in accordance with the terms of his deed; and, on the thirtieth of that month, the company presented a bill to the judge of the circuit court of Alexandria county, praying for an injunction against such sale, attacking the validity of the debt named in the deed, and averring that it was subsequent in dignity to the Bradley deed securing the city of Washington. The Bradleys and city were made parties defendant, and so were Lennox and James S. French, the president, individually, made defendants. On the third of April, the city of Washington filed a cross-bill in the same suit asking affirmative relief. On the twenty-fifth of May, 1859, the circuit court of

Alexandria county made a decree in the suit thus described, containing, among others, the following clauses:

"The court doth adjudge, order, and decree that the certificate of acknowledgment to the deed of trust from the Alexandria & Washington R. R. Co. to I. Louis Kinzer, dated on the thirty-first of December, 1856, and filed in this cause, not being in conformity with the statute of Virginia in such case made and provided, the said deed was illegally admitted to record, and that the said deed from the Alexandria & Washington R. R. Co. to Joseph H. and Thomas A. Bradley, dated on the tenth day of July, 1857, and recorded on the twenty-third day of July, 1857, having been recorded according to law, created a lien in favor of said city of Washington upon the property and works of the said Alexandria & Washington Co., paramount to the lien created by the said deed of trust to the said I. Louis Kinzer, etc. And the court doth further adjudge, order, and decree that the said Fowle, Snowden & Co. recover against the said Alexandria & Washington Co. the sum of $16,481.35, with interest, costs," etc.

The first day of the term, at which this decree was rendered, was the sixteenth of May, 1859. From this decree appeal was taken by Fowle, Snowden & Co., to the supreme court of appeals of Virginia, in the petition for which there were assigned, among others, as grounds of error: (1) that the Kinzer deed was properly admitted to record; (2) that the Bradley deeds were invalid, because there was no express provision of law authorizing Washington city to guarantee the Alexandria & Washington Co.'s bonds; (3) and that if the Kinzer deed had been improperly admitted to record yet it "was valid and created a lien, although it might be subordinate to other liens," and yet the court "nowhere affixed to this lien its rank in the order of priorities." It does not appear that execution was ever taken out on this decree in favor of Fowle, Snowden & Co., rendered on the twenty-fifth of May, 1859.

The following are the amounts of the debts reported:

Debt under the Bradley deed to the city of Washington	$154,340
Debt under the Lennox deed to English creditors	102,092
Debt due on the Hay judgments	79,405
Debt due Fowle, Snowden & Co	22,785
Claim of the Alexandria & Fredericksburg R. R. Co. of $110,451, allowed by the court at	56,610

A creditor's bill was brought in this court to ascertain the debts of the Alexandria & Washington Co., and to settle the order and priorities of liens. The case was heard by Chief Justice Waite and Judge Hughes on the fourth and fifth of February, and is now decided as indicated by the following opinion delivered by Judge Hughes:

Eppa Hunton and Francis Miller for the city of Washington.

John Selden, C. W. Wattles, and Leonard Marbury for Lennox creditors.

Francis L. Smith and Wayne McVeagh for the Alexandria & Fredericksburg Co.

O. A. Cloughton for Fowle, Snowden & Co.

HUGHES, J.—The task of the court is to pass upon the relative priorities of the several deeds and judgments resting as liens upon the property of the Alexandria & Washington R. R. Co., and ascertain the rights with reference to these liens of the Alexandria & Fredericksburg R. R. Co. in respect to its claim for betterments. The priority of the lien of the Bradley deed over the Kinzer deed is res judicata as between the two; and, as the former deed antedates all other liens by deed or judgment upon the property of the company, it must have precedence over them all, unless there be something in the objection, that the guarantee of the city of Washington to the holders of the bonds of the railroad company was ultra vires, as being in conflict with the tenth section of the city charter of 1848. On this subject it may be remarked that there has been a direct adjudication by the court of highest resort in Virginia, where the property embraced in this deed lies, that notwithstanding this objection, the Bradley deed is a lien upon the property of the Alexandria & Washington Co. as of the twenty-third of July, 1857. It is true that this decree does not, in a technical sense, conclude those who were not parties to the suit in which it was rendered; but it carries all the authority of a decision of the highest court of the State in which the land affected by it lies, upon a question directly raised before it. Independently of these considerations, it may be added that the mortgage secured the bonds and created a valid lien on the property. When the city took up these bonds this lien was not vacated. The cancellation of the city's signature on the bonds did not cancel the liability of the railroad company for their payment. The city might have contested her liability on the bonds, but the subsequent lienholders are in no condition to contest the title of the city to the bonds. It is a matter of no importance to them whether the city gets the money, or some one else. The debt is still owing by the company, and the lien for its security is a valid one. So, the conclusion of the court is, that the Bradley deed is a first lien by deed or judgment upon the property of the Alexandria & Washington Co., dating as of the twenty-third of July, 1857, for the debt it secures, as reported by Commissioner Fowler.

The Lennox deed is really not disputed, and having been recorded on the twenty-fourth of July, 1857, antedates and ranks all deeds and judgments except the Bradley deed. It is true that Lennox, the trustee, had personal notice of the execution; but this

notice to him cannot bind the bondholders whom he represents, who took the bonds without notice. For all purposes of notice, the trust deed must, in this case, be treated as executed to the bondholders.

The Hay judgments and the claim of Fowle, Snowden & Co., as this latter is represented by the Kinzer deed, and by the decree of the circuit court of Alexandria county, rendered on the twenty-fifth of May, 1859, must now be considered. Two of the Hay judgments antedated the decree; two of them were simultaneous with the decree (the two judgments and the decree having taken effect as of the first day of the same term of the court which rendered all of them, viz.: the sixteenth of May, 1859); and three of the judgments were subsequent to the decree.

It will be necessary to consider the objections urged respectively against the claim of Fowle, Snowden & Co., and the Hay judgments.

First, of Fowle, Snowden & Co.'s claim. The circuit court of Alexandria county, in a case in which that question was directly presented before it, decided that the Kinzer deed was not legally recorded in pursuance of the registration laws of Virginia, and did not constitute a lien upon the property of the Alexandria & Washington Co. Appeal was taken by Fowle, Snowden & Co., to the court of appeals of Virginia; the appellants in their petition for the appeal assigning as a ground of error, that the court below pronounced the registration absolutely illegal, and not merely as it should have done, subordinate to the Bradley deed. The appellate court rendered a general decree of affirmance, thereby establishing the validity and finality of the decree below. It is true that the judge who delivered the opinion discussed only the question whether Fowle, Snowden & Co. had notice of the previous execution of the Bradley deed when they took the Kinzer deed, but the decree itself, which was the act of the whole court, affirmed the decree below generally, and made no such limitation of affirmance in its decree as the individual judge had done of argument in his opinion. In a very recent case, that of Davis v. Beazley, 75 Va. 491, the supreme court of appeals has put the matter at rest in this State by holding that the grantee or beneficiary in a deed, is not allowed, as an officer, to take an acknowledgment of the deed by the grantor, with a view to its registration; that the certificate of such acknowledgment is invalid, and hence a recordation of it based upon such certificate is without effect. We are therefore relieved of the necessity of considering whether this court, in an original case, would hold that a director of a corporation, which makes a trust deed preferring himself over other creditors, is incompetent to take and certify the acknowledgment of that deed for registration in the additional capacity of notary public; especially a deed which was agreed to be held for a time from registration.

The debt of Fowle, Snowden & Co. therefore having no footing as a lien by virtue of the Kinzer deed, stands exclusively upon the decree of the twenty-seventh of May, 1859, establishing it. It is stated by opposing counsel that no execution was ever taken out on this decree. It does not seem to be pretended by any one that execution was ever issued. The record does not show that it ever was. Not only have ten years elapsed since the decree, but twenty years. As to adverse lien creditors, the right to sue out a writ of scire facias upon the decree is lost, and the right to bring an action upon it is gone. What, then, is the status of the lien of the decree? A Virginia text-writer of eminence, Prof. Minor, lays it down that the lien of a judgment is suspended when the right to revive it by scire facias or action is lost. 2 Minor Inst. 272. And Mr. Barton, another text-writer, has this passage, referring to the twelfth section of chapter 182, Code 1873:

"The right to enforce the lien of a judgment, although the statute (in section 9) declares that it may always be enforced in a court of equity, is confined to the time that an action may be brought, or scire facias sued out thereon, and after that time the lien ceases to exist." See 1 Barton, Ch. Pr. 109.

The debt of Fowle, Snowden & Co. is bottomed therefore on no lien, and is to be treated in this suit as an unsecured claim against which a plea of the statute of limitations has not been interposed.

Coming now to a consideration of the Hay judgments. Four of them had been assigned to Hay by the original plaintiffs after they had been recovered. The plaintiffs in two of the four suits were citizens of Massachusetts, and the judgments assigned were rendered respectively on the twenty-fifth of November, 1857, and on the ninth of February, 1858. The other two of these four judgments were recovered by residents of Virginia, and assigned to Hay, bearing date on the twenty-seventh of May, 1859, but taking effect as of the 16th of May, 1859. On these four judgments Hay brought an equity suit in this court in 1875, in which he prayed that the satisfactions which he had caused to be marked on these judgments in 1860 might be said aside, and the liens which had originally attached to the judgments might be restored. Decree was obtained in this court in 1881. It is objected to the validity of the decree that this court had not jurisdiction as to two of the judgments, to entertain a suit brought by Hay on them, inasmuch as the second clause of section first of the judiciary act of 1865 (Supp. Rev. St. p. 174, c. 137) declares that the circuit courts of the United States shall not have cognizance of suits brought by assignees of causes of action, where their assignors could not sue. Waiving the question whether the decree under consideration can be assailed collaterally, it is to be remarked, that the object of the equity suit brought by Hay in this court was to set aside "satisfactions" which had been marked upon the

judgments at a time when they had become the property of Hay. The consideration for which they had been so marked had proved null and void. The satisfactions had been executed on an implied promise of the company, to Hay himself, that if the consideration should fail, the company would make good the judgments. This obligation, arising ex equo et bono, from the company to Hay himself, was the cause of action on which the equity suit was founded. It was a cause of action arising directly in favor of Hay, irrespectively of the manner in which he had acquired this property, and the jurisdiction of this court to entertain a suit by Hay, a non-resident, against the Alexandria & Washington Co., a resident of Virginia, upon this cause of action which had accrued to himself was complete. But even assuming, what is not true, that the original causes of action on which the judgments had been obtained in the State court were still the basis of the equity suit brought in this court, even in that case the jurisdiction of this court was good. Two of the judgments had been recovered by citizens of Massachusetts, the other two by citizens of Virginia. As to the first two, the jurisdiction was undoubted. The owner of these brought the suit; and the only question is, whether he had a right to join in his suit two judgments against the same defendant which had been assigned to him with no purpose or intention of evading the jurisdiction of the State court. This question would seem to be settled by the first clause of the first section of the act of 1875, which provides in substance that the circuit courts of the United States "shall have cognizance of all suits, etc., in which there shall be a controversy between citizens of different States, etc." The controversy of Hay respecting the judgments as to which the jurisdiction was undoubted, gave under this clause jurisdiction of the suit which embraced two other controversies which were not between citizens of different States. It is true that the clause of the act of 1875, on which this objection is based, would not authorize causes of controversy to be embraced in a suit which had been assigned for the purpose of having them sued upon in a United States court. Section five of the same act forbids assignments for such a purpose; but this very section, by forbidding the joining of causes of action assigned for this purpose, impliedly authorizes causes of action not assigned for such purpose to be so embraced. If a suit is found to embrace causes of action assigned for this purpose the court will dismiss it as to such causes of action, retaining it as to the others, as was done by the supreme court of the United States in Inhab. of the Township of Bernards v. Stebbins, decided at the present term and reported in 109 U. S. 341; s. c., supra. This principle has been frequently applied as to parties by the supreme court, in suits in which the court has held that though all the plaintiffs and all the defendants marshalled on opposite sides of a cause, were not residents of different States, yet

if there be a separable controversy between citizens of different States, that fact may of itself give jurisdiction of the whole suit. If a separable controversy as to parties can bring a suit into a federal court, there would seem to be no reason why a separable controversy as to causes of action should not do so; except, indeed, in suits where a fraud upon jurisdiction is attempted, as contemplated by section 5 of the act of 1875. These four judgments having therefore been legally relieved of the "satisfactions" that were marked upon them, and the liens which they created having been legally restored, must take rank as of the twenty-fifth of November, 1857, the ninth of February, 1858, and the sixteenth of May, 1859, respectively, and must be given precedence over the debt of Fowle, Snowden & Co.

As to the objection that these four judgments, and the three others that were sued over in this court by Hay, and judgment anew obtained upon them in 1881, were merged in the new decree and judgment, it is to be remarked that one of the objects of section 12 of the 182d chapter of the Code of Virginia, in requiring judgments to be kept alive by scire facias, or new action, within 10 or 20 years, according as the issuing and return of executions on them might determine, was to provide a means of keeping alive judgments and their liens; and of quieting titles where judgment creditors slept too long on their rights. It is therefore a very strange pretension that the pursuit of the very remedies given by the State to keep alive judgments, and their liens, merges and extinguishes them. Although executions had been taken out on the original judgments owned by Hay, much time had elapsed when his suits were brought upon them in this court in 1875. Doubtless the provisions of section 12 of the 182d chapter of the Code suggested and induced those actions; and this court is unwilling to hold, in view of these statutory requirements, that the plaintiff in those suits, by complying with those requirements, lost the very rights which he was seeking to perpetuate. Whatever may be the general doctrine in other jurisdictions, as to the merger of one judgment into another, it cannot be so applied in Virginia as to convert the statutory provisions that have been alluded to into a delusion and a snare. Besides, it is to be observed, as to the four judgments which were the subject of the equity suit, that suit was brought, not to obtain a new judgment upon the old ones, but to strike from the old ones an inscription which rendered them practically valueless, and to restore to them their original force and attributes. The object was the opposite of merging them, if that were the necessary effect of obtaining a new judgment on an old one. It was to place them in statu quo as of the dates on which they were originally recovered, divested of the satisfactions which had been improvidently put upon them. The doctrine of merger,

therefore, whatever it may be in ordinary cases, does not apply to these four judgments.

Summing up what has been said, the several debts stand as to each other in the following order: (1) the debt due the city of Washington; (2) the bonds held under the Lennox deed; (3) the Hay judgments, seven in number; and (4) the unsecured claim of Fowle, Snowden & Co.

It remains to be considered how these several claims stand in respect to the claim for betterments put upon the western 18½ feet of the roadway of the Alexandria & Washington Co. while in possession of the Alexandria & Fredericksburg Ry. Co. under the proceedings taken in the county court of Alexandria county. It is clear that this claim can only affect the western strip of roadway that has been mentioned; and the conditions prescribed by statute entitling the Alexandria & Fredericksburg Co. to compensation for betterments seem to exist here. It is true that there is a profuse ascription of fraud against this company in the briefs of adverse counsel; but no proof has been made in the evidence establishing that fraudulent means were used by the company to secure the condemnation of the ground in question, or to obtain control of the Alexandria & Washington R. R. Co. and its property. We have only to consider what and how allowance is to be made to this company for its betterments. The control of this road from Alexandria to the Long Bridge must have been of much greater importance, and the use of it of much greater value, to the Alexandria & Fredericksburg Co., and its associate companies north and south, than could be measured by the pro rata receipts of net earnings in money, which accrued to it from that short section of road, especially if no account is taken of the five years' rent, which the Alexandria & Washington Co. might be entitled to as a credit under the statute of Virginia relating to betterments. It will be safe to assume that the Alexandria & Fredericksburg Co.'s use and control of the road for 10 years have abundantly compensated it for all outlays it may have made for repairs, taxes, and other incidental charges. Its original outlay of $59,610.07 in constructing the road-bed and track on the western strip is all, therefore, that we think ought to be allowed as a first lien on that strip to the Alexandria & Fredericksburg Co. As to the manner of providing that amount for this claimant, if it cannot be agreed by the parties in interest what proportion the value of this 18½ feet shall bear to that of the whole 50 feet of road, it must be referred to the master to determine that proportion. The road must then be sold as a whole, and the purchase money be separated into two portions to represent respectively the proceeds of the sale of the old part and of the new, and the respective funds applied as has been indicated in this decision.

WAITE, C. J., concurs.

SANTA CRUZ COUNTY SUPERVISORS
v.
SANTA CRUZ RAILROAD CO.

(111 *United States Reports*, 361.)

This court will not take jurisdiction to review the action of a State court if the federal question raised here was not raised below, and if no opportunity was given to the State court to pass upon it.

MOTION to dismiss, on the ground that the federal question raised here was not raised below.

Edward R. Taylor for defendant in error.

S. O. Houghton for plaintiff in error.

WAITE, C. J.—This was a suit brought by the Santa Cruz R. R. Co. to require the Board of Commissioners of the County of Santa Cruz to deliver certain bonds, claimed to be due from the county under a contract with the railroad company. The defences were, 1, that the contract was unilateral, and, therefore, not binding on the county; 2, that the board of supervisors exceeded its authority in making the contract; and, 3, that a repealing statute, passed after the contract was entered into, took away the power of the board to make any further deliveries of bonds. No objection whatever was made to the validity of the statute under which the board assumed to act in making the contract. The whole defence rested on the construction and effect to be given to certain statutes, which no one denied the constitutional power of the legislature to enact.

The ground of federal jurisdiction, relied on in the brief of counsel for the county, is "that, by the issuance of the bonds demanded in this proceeding, the State would deprive the tax-payers of the county of Santa Cruz of property without due process of law, contrary to the right, privilege or immunity secured by the first section of the Fourteenth Amendment of the Constitution of the United States."

That was not the question presented to or decided by the State court. In that court the inquiry was, whether the proceedings of the board to charge the county were according to law; not whether the law under which the proceedings were had was constitutional and binding on the tax-payers. The State court decided that the proceedings were in accordance with the requirements of the law, and thus created an obligation on the part of the county to deliver the bonds, which was not discharged by the repealing statute relied on. This decision involved no question of federal law, and is not reviewable here.

The motion to dismiss is granted.

CRAIG
v.
TOWN OF ANDES.

(93 *New York Reports*, 405.)

A recital in a bond, purporting to have been issued by a town under the New York act of 1869, chap. 907, Laws of 1869, in aid of a railroad company, to the effect that all the necessary legal steps have been taken to comply with the statute, does not estop the town from questioning the validity of the bond, even in the hands of a bona fide holder.

The judgment of the county judge, in proceedings under said statute to bond a town, may be questioned for want of jurisdiction.

The only effect of the provision of said statute, giving to such judgment and record "the same force and effect as other judgments and records in courts of record," is to relieve the holders of bonds issued under it from proving the proceedings prior to the judgment, and to impose upon the town the burden of proving want of jurisdiction.

Jurisdiction could only be conferred under said act by the presentation of a petition conforming to its requirements; it confers no jurisdiction upon the county judge to pass conclusively upon the form of the petition, and its sufficiency is always open to inquiry.

The petition of tax-payers required must be absolute in form; no power is given to them to make their request conditional upon the location of the road upon a particular route, and a request coupled with such a condition is absolutely void.

In proceedings under said act to bond the defendant, about one fourth of the petitioners attached to their requests a condition that the road should be located upon a specified line, excluding these, there remained much less than a majority either of tax-payers or property. The petitions consisted of several distinct papers, but they were treated by the county judge as one petition, and his order was predicated upon them as such; there was but a single verification thereto. In an action upon coupons attached to the bonds, *held*, that the condition affected the entire petition and rendered it void, and as the defect was apparent upon the face of the petition the county judge acquired no jurisdiction; and that plaintiff, although a bona fide holder, was chargeable with notice of the defect.

The petition was signed in 1870; the order of the county judge, based thereon, was made prior to the passage of the act of 1871 (§ 1, chap. 925, Laws of 1871), which authorizes conditional petitions. *Held*, that said act had no application; that the sufficiency of the petition was to be determined with reference to the act of 1869.

Also *held*, that the case was not affected by the act of 1870 (chap. 507, Laws of 1870), defining the powers of commissioners appointed under the act of 1869.

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, made at the November Term, 1882, which reversed a judgment in favor of defendant, entered upon the report of a referee, and granted a new trial.

This action was brought to recover the amount of certain coupons alleged to have been cut from bonds issued by defendant,

under the act chapter 907, Laws of 1869, in aid of the construction of the Delhi & Middletown R. R. Co.

The material facts are stated in the opinion.

I. H. Maynard for appellant.

Barna Johnson for appellee.

DANFORTH, J.—The plaintiff alleged the performance of the statutory conditions on which alone the defendant could be made liable to pay the bonds or coupons in question, but in the opinion of the trial court so failed in proof that it gave judgment against him upon the ground that those instruments "were issued without authority of law," and were void. This has been reversed by the supreme court, and a new trial granted, but upon what ground does not appear. The respondent, however, seeks to maintain the order of reversal upon the grounds, first, that the bonds recite on their face "that all necessary legal steps and proceedings have been taken to comply with the laws under which they were issued; second, that the judgment and adjudication of the county judge of May 22, 1871, is absolutely conclusive upon the defendant; third, that the statute was in fact complied with."

It would be a sufficient answer to the first position that the recitals in the bonds are not in the form above suggested.

It is, however, unnecessary to discuss this question, for we have heretofore refused to give that effect to the recital in similar bonds, and have repeatedly held that one who takes such instruments, although in good faith, must see to it that they are authorized by the statute under which they purport to have been issued. Town of Lyons *v.* Chamberlain, 89 N. Y. 585; Cagwin *v.* Town of Hancock, 84 id. 532.

The next proposition is of a more serious character. The statute (Laws of 1869, vol. 2, p. 2303, chap. 907, §§ 1, 2) enables a majority of its tax-payers whose names appear upon the last preceding assessment-roll of the town, as owning or representing a majority of the taxable property within its corporate bounds, to set in motion by their petition proceedings which, if successful, would cause the town to bond itself in aid of the railroad company named therein, and confers upon the county judge authority to adjudge and determine whether, as alleged in their petition, they did constitute such majority of tax-payers representing such majority of taxable property, and if so, cause his determination to be entered of record, and gives to such judgment and the record thereof "the same force and effect as other judgments and records in courts of record in this State." This determination has been made and is relied upon by the plaintiff, but on the part of the defendant it is insisted that the judgment of the county judge is null and void for want of jurisdiction. This question it can fairly raise. The general doctrine is well settled that the jurisdiction of any court exer-

cising authority over a subject may be inquired into in any court where the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings. This rule was laid down in Elliott v. Peirsol, 1 Pet. 328, and cited with approval by this court in Chemung Canal Bank v. Judson, 8 N. Y. 254. So far as this question is concerned the only effect of the statute (§ 2, supra) was to relieve the plaintiff from the necessity of showing, step by step, the proceedings which led up to the judgment, and place upon the defendant the burden of showing that no jurisdiction in fact existed in the county judge. The plaintiff, however, did not avail himself of this privilege. He treated the judge as an inferior tribunal and undertook to show the facts relied upon to give him jurisdiction. He left no room, therefore, for the presumption which would otherwise have required evidence from the defendant to remove. As the case stood it could show, if possible, not that the judgment was erroneous, but that it was void. In this it was properly successful, if the conditions on which that jurisdiction depended had not been fulfilled. Davidsburgh v. Knickerbocker L. Ins. Co., 90 N. Y. 526; Ferguson v. Crawford, 70 id. 253; 26 Am. Rep. 589; People, ex rel. Tweed, v. Liscomb, 60 N. Y. 568; 19 Am. Rep. 211; People, ex rel. Rogers, v. Spencer, 55 N. Y. 1. These cases go upon the ground, now well established, that the record, whether of a superior or an inferior court, is never conclusive as to the existence of a jurisdictional fact, and that a defendant may show a want of jurisdiction, although the record avers the contrary. Davis v. Packard, 6 Wend. 327; Bloom v. Burdick, 1 Hill, 130; People v. Cassels, 5 id. 164; Ferguson v. Crawford, supra. And quite applicable to the present inquiry is the declaration of Paige, J., in Hard v. Shipman, 6 Barb. 621, cited with approval in Ferguson v. Crawford (supra), "that if the court had no jurisdiction, it had no power to make a record, and the supposed record is not in truth a record." Had the county judge then jurisdiction? This could only be conferred by the presentation of a petition conforming to the statute. Town of Wellsborough v. N. Y. & C. R. R. Co., 76 N. Y. 182; People v. Spencer, supra. Such petition would be absolute in form, and express, first, a desire that the town be bonded in a sum named; second, directions for the investment of the bonds or their proceeds in a specified security of the railroad company named in the petition. People, ex rel. Rogers, v. Spencer, supra. The petition presented to the county judge and on which he acted is not within these limits. Thirty-seven petitioners, representing in the assessment list property valued at $46,250, insert a "condition that said road is located by Fish lake and Shavertown;" six petitioners, representing $12,150 of property, insert a condition that it "be located by Fish lake and Shavertown or village," and ten others, representing $13,050, that it be located "by Shavertown and Lum-

berville." These conditional petitioners constitute about one fourth of all the petitioners and own more than that proportion of the property owned by all the petitioners, and excluding them there would remain on the petition much less than a majority either of tax-payers or property. But they were not excluded.

The county judge predicated his order upon them, treated all the papers as constituting one petition, and filed and made them one record. The conditions, therefore, affect the entire petition. The statute confers no power upon the tax-payer to indicate or secure a railroad location to suit his convenience or benefit his property, but, for the advantage of all the town, enables him, as one of the majority, to appropriate its money to a railroad already organized, and whose line should have been determined according to the unbiased judgment of its managers. This is not a mere formal or technical condition. The General R. R. Act (Laws of 1850, chap. 140), into which the Bonding Act of 1869 (Laws of 1869, chap. 907), is introduced by amendment, permits an entry by a railroad corporation upon the lands of any owner against his consent and without compensation, for the purpose of making such examination and survey "as may be necessary to the selection of the most advantageous route," and requires a map and profile of the route intended to be adopted, to be filed, and notice of such filing given to the occupant of the land traversed by the proposed road. And this, if objected to, is to be either altered or confirmed as may, in the opinion of the supreme court, "be consistent with the just rights of all parties and the public." It is to a road thus located, after the exercise of power over the property rights of individuals which nothing but public necessity could warrant, by parties indifferent between various sections of a town, or by judicial action, that the attention of the tax-payers is to be directed and their favor obtained in view of a public benefit to the municipality. This would be interfered with, or wholly defeated, by an arrangement depending upon successful solicitation of a property owner whose consent was given on the express condition that his preference should be followed. A petition that aid be extended to a railroad company, provided a certain thing is done, is very different from a simple petition that aid be extended to that company. It must also be borne in mind that this petition is to be addressed to the county judge, and that he has no power to accept or reject the condition, consequently none to make the petition effective. It has already been said by this court "that the presentation of a proper petition lies at the basis of his jurisdiction," and that if any facts, required to be stated, are omitted, all the other proceedings are fatally defective. In People, ex rel. Rogers, *v.* Spencer, supra, the petition failed to state that the railroad corporation named was a domestic one, and on that ground the court reversed the adjudication of the county judge. In People, ex rel.

Green, v. Smith, 55 N. Y. 135, the proceeding was under the act of 1871, which required the petition to show, in addition to the facts called for by the act of 1869 (supra), that the petitioners were a majority of the tax-payers, "not including those taxed only for dogs, or highways only," and it was held that by reason of this omission the county judge acquired no jurisdiction of the proceedings, and that he could not, of his own motion, dispense with the performance of a condition precedent to the exercise of the authority conferred by the act. This decision was followed in a much later case (Town of Wellsborough v. N. Y. & C. R. R. Co., 76 N. Y. 182), and for the same defect in the petition it was held that the county judge acquired no jurisdiction and that his order and subsequent proceedings were void. It was there also declared to be the settled doctrine of the court that the proceedings for town bonding in aid of railroads will not be sustained, "when there has been a failure to comply strictly with the statutes conferring the authority."

The desire expressed in the petition is not within the purview of the act. (Laws of 1869, supra.) The petitioners give no absolute consent. It is qualified or conditional. We desire, they say, the company to be aided, provided, or on condition, that the line of the road is as we indicate. So far as the petitioner himself is concerned, the right to tax his property is clogged with the condition that the road shall run as he directs, and is entirely inconsistent with the right to create a tax in aid of a road constructed without reference to his wish, and with regard only to the public good. This seems plain enough on any principle applicable to the construction of statutes, but it is also within the authorities, which uniformly require that every statutory condition, precedent to the taking, by any mode, of private property for public use as against the will of the owner, shall be strictly complied with. Dyckman v. Mayor, etc., 1 Seld. 439; N. Y. & B. R. R. Co. v. Godwin, 12 Abb. Pr. (N. S.) 21; In re Boston, H. T. & W. R. Co., 79 N. Y. 71.

In proceedings under certain acts giving a materialman or mechanic a lien "with the written consent of the owners," it was held that the consent must be absolute and not conditional, and that such consent, when coupled with the provision that the repairs should be at the cost of the tenant, was not an absolute consent, and was insufficient to authorize a lien upon the building. McClintock v. Criswell, 67 Penn. St. 183; Boteler v. Espen, 99 id. 313.

In Butternuts and Oxford Turnpike Co. v. North, 1 Hill, 518, the defendant subscribed for stock in plaintiff's road, "Upon condition that said road shall be laid by Fayette village and Guilford Centre." The commissioners for securing subscriptions obtained several signatures to this, and also to another, absolute in its terms.

Upon suit brought the court held the subscription did not bind the defendant, saying subscriptions for stock, under the act there in question, 1 R. S. 578, must be absolute, adding, in words applicable here, "this act confers no power to make conditions, and to allow such a thing would be contrary to public policy. Divers men would perhaps have their divers routes, and endeavor, improperly, to influence the course of the road." This case was cited and applied by this court in Fort Edward & Fort Miller Plank Road Co. *v.* Payne, 15 N. Y. 583, where the condition of subscription was that the road should be extended to a point named by the subscriber. The subscription was held void, as tending to promote private interest at the sacrifice of the public convenience, for which, alone, the formation of such corporations was authorized.

In Troy & Boston R. R. Co. *v.* Tibbits, 18 Barb. 298, a conditional subscription to stock in a railroad corporation, organized under the General Railroad Act, was held void, Judge Wright saying: "The law of 1848 confers no power to make conditional subscriptions, and such a thing is contrary to public policy." So, in People, ex rel. Averill, *v.* Adirondack Co., 57 Barb. 656, the General Term of the third department held the order of the county judge, made under the act now before us, to be void, because "it was based upon a petition that was conditional and not absolute," requiring the money raised to be used in a particular county. These cases apply here. The petition is not absolute. The order is based upon it, and the statute, by compliance with which, alone, the town can be bound, has not been followed. This defect was apparent upon the face of the petition, and it follows, both that the county judge had no jurisdiction to entertain the proceedings —consequently, none to make a record or judgment—and that the plaintiff is affected with notice thereof. It is also to be considered that the statute by which the action of the county judge is directed confers upon him no power to pass conclusively upon the form of the petition. Its sufficiency is always open to inquiry. His judgment can be called for upon two points only: First, whether the petitioners do represent a majority of tax-payers, and second, a majority of the taxable property. People, ex rel. Rogers, *v.* Spencer, supra.

The conclusion reached by us upon the point already considered renders it unnecessary to discuss other questions raised by the appellant, and also answers the claim of the plaintiff that the town is estopped from questioning the validity of the coupons, for, as they were issued without authority and in violation of law, there is, in respect to them, nothing in the circumstances of the case to prevent the defendant from availing itself of that defence. Cagwin *v.* Town of Hancock, supra. The learned counsel for the respondent relies upon the decision in Calhoun *v.* Delhi and Middletown R. R., 28 Hun, 380. It was in equity and in-

volved the allowance of an injunction to restrain the payment of bonds issued under the proceedings above referred to, and to have them adjudged void and cancelled. Many propositions are discussed by the learned judge in the opinion there given, which we do not find it necessary now to determine. Nor is the correctness of that decision in question here, for a court of equity might, in its discretion, refuse to interfere, and leave the party to his legal rights.

But so far as the question relates to the form and validity of the petition, the views of the learned judge are at variance with those above expressed, and we cannot agree with them. They are in substance, first, that the condition inserted in the petition was a modification which the petitioner had a natural right to make; second, that it is expressly authorized by the act of 1871 (Laws of 1871, chap. 925, § 1), which declares that the petition may be absolute or conditional; third, because as stated upon argument before him, the railroad as a fact was located by Fish creek and Shavertown, and so he says "no ground of complaint on that score exists." The first and third might deprive the party consenting of any favor from a court in equity, but cannot be accepted as equivalent to the positive consent of the tax-payer, upon which alone the jurisdiction of the county judge could be invoked. The whole proceeding is in violation of natural right. That leaves to each person control over his own property without regard to the wishes of his neighbors, however numerous, and the statute which permits their interference is, as we have already held, "subversive of the just rights of the minority." Town of Wellsborough *v.* N. Y. & C. R. R. Co., supra. Whoever, therefore, claims an advantage from it must see that each step required by the statute is taken in the manner and at the time prescribed. People *v.* Spencer and Town of Wellsborough *v.* N. Y. & C. R. R. Co., supra. In these cases although the fact omitted from the petition was supplied by evidence, the proceedings failed because the statute was not complied with.

As to the other ground: The statute of 1871 (supra) has no application. The petition was signed in 1870 and presented to the county judge and filed by him on the 6th of May, 1871; on that day he made the order which lies at the basis of these proceedings, and it must be sustained, if at all, upon the jurisdiction thus acquired. The act of 1871 was not passed until May 12, 1871. It cannot aid this case. If it is applied, however, the proceedings would be defective, for a reason supplied by that act itself. Under it persons taxed for dogs or highways only are excluded from the number of those who may be counted as petitioners, and that they were excluded must appear in the petition and judgment. People *v.* Smith, supra. This was not necessary under the act of 1869, and in that respect the petition is good; as one under the act of

1871, it is not good. But as the proceedings were commenced under the act of 1869, the sufficiency of the petition must be determined with reference to that act, without regard to the subsequent amendment. Ely *v.* Holton, 15 N. Y. 595; Syracuse Savings Bank *v.* Town of Seneca Falls, 86 id. 317; s. c., 7 Am. & Eng. R. R. Cas., 216; People, ex rel. Peake, *v.* Board of Supervisors, 43 id. 130. This amendment does, however, indicate the understanding of the legislature of the law as it stood before the passage of the act, and the great change in phraseology shows that in their opinion a conditional petition was not authorized by the prior act of 1869, supra. People, ex rel. West. F. I. Co., *v.* Davenport, 91 N. Y. 574; Hardcastle on Statutes, 67. It is true the petition consists of several distinct papers, but, as already stated, they were acted upon by the county judge as constituting a single instrument. Indeed no part could have been rejected. A proper petition was a condition precedent to his jurisdiction—that is, to his right or power to entertain the matter at all—and the papers presented could only be taken as presented and as a whole. The petition is also required to be verified. That too is a jurisdictional circumstance. There was but a single verification, and looking at the case in a manner most favorable to the plaintiff, the affiant referred to the whole body of papers as "a petition." If, therefore, we reject the portions which contain the conditions, we take away at the same time the verification, so that in either aspect the petition fails to show that the county judge had jurisdiction to entertain the proceeding, and it could not be acquired by any adjudication of his own. The petition itself must be looked to in order to determine whether he had in fact jurisdiction to take proof of the facts set forth therein "as to the number of tax-payers joining in such petition and as to the amount of taxable property represented by them."

Our attention is also directed to the act of 1870 (Chap. 507, vol. 2, Session Laws of 1870) entitled "An act to define the powers of commissioners appointed under chapter 907 of the Laws of 1869, binding municipalities to aid in the construction of railroads." Its provisions do not seem to aid the plaintiff or have any tendency to relieve the case of the difficulty I have been considering. Its title indicates its object, and the act itself clearly relates to a different matter from the one on which the difficulty arises. "It shall be competent," it declares, "for any corporation, in aid to the construction of whose railroad, bonds shall have been authorized to be issued by any municipal corporation" . . . . . "to enter into any agreement with the commissioners appointed to issue said bonds, limiting and defining the times when, and the proportion in which, said bonds or their proceeds shall be delivered to said corporation, and the place or places where, and the purposes for which, such bonds or their proceeds shall be applied

or used, and any such agreement in writing, duly executed by such corporation, and a majority of such commissioners, shall . . . . be valid and effectual." It confers a new power upon these officers, but I am unable to see that it relieves the petition of the defect by reason of which it is ineffectual for any purpose, even to authorize the appointment of commissioners. It gives no power to locate a road, but the right to designate upon what portion of a road already located the bounty of the town shall be applied. Nor can the case of The People, ex rel. Hoag, v. Peck, 4 Lans. 528, to which also reference is made, help out the respondent. The petition then before the court was presented under the act of 1871 (supra), and was thought to be authorized by it, and the remarks of the court as to the probable effect of the act of 1870 can hardly be deemed to express even the opinion of the learned judge who spoke for the court, for they were made as suggestions merely, and are not consistent with the principle then fully established by this court and referred to with approbation in the case cited, by which nothing can be presumed or intended in favor of these proceedings, and which requires the party endeavoring to maintain them to show that the terms of the statute have been in all essential particulars complied with. That compliance has not been shown. The petition is fatally defective. It warranted no action by the county judge, and we are constrained to say that the objection of the defendant was good, and the appeal well taken.

It follows that the order appealed from should be reversed, and the judgment entered on the report of the referee affirmed, with costs.

FINCH, J. (dissenting).—I do not concur in the conclusion which the majority of the court have reached, nor in the reasoning upon which that conclusion is founded. The town of Andes disputes the validity of its bonds, after having steadily paid the interest upon them for a period of about ten years, after having also paid a part of the principal, and when innocent persons, deceived by the appearance of validity, have largely become their owners. The adjudication of the county judge, before whom all parties were summoned, and given an opportunity to be heard, has remained unchallenged during all this period of time, but it is now discovered to have been without jurisdiction. The ground of this conclusion is a single one out of many alleged, and to that one alone it now becomes necessary to direct attention. Briefly, though I trust fairly, stated it is this: that under the statute of 1869 a petition, "absolute in form," was requisite to the jurisdiction, and that the one presented was not "absolute in form," because one quarter of the signers added to their consents conditions that the railroad be located by a particular route.

Now it is to be observed that the statute nowhere, either in terms or by necessary implication, prescribes the "form" of the petition. The language of the act is not that the majority of the tax-payers must signify their desire without condition annexed. No such words are in the act. The legislature has not so declared. The requirement is argued into it as an unwritten necessity of the petition from the alleged fact that conditional consents are ineffective and unavailing, and that the county judge could not render them operative; and then jurisdiction is denied in the present case because the evidence shows that without the conditional signers a majority in number and amount were not represented on the petition. This last suggestion seems to me indefensible, and should be considered first in order to remove from the discussion what may obscure and confuse it.

The question of jurisdiction arises solely upon the paper presented. Nothing else, no other evidence, no after-ascertained facts are before the officer. Neither he nor we have any right to mix up that question with facts afterward proved. The fact advanced and relied upon to justify a denial of jurisdiction depends upon the number of tax-payers in the town as represented on the last preceding tax-roll. But that tax-roll was not before the county judge on the presentation of the petition. The officer could not judicially know how many names were on the tax-roll, how many tax-payers were in the town, or what number of signers constituted a majority of the unknown whole number. He could not know and had no right to know; and to argue him out of his jurisdiction, by reference to what is said to have been proved when his jurisdiction was assailed on the trial in the present case, is to make the jurisdiction depend, not upon the face of the petition as presented, not upon the sufficiency of its allegations, but upon their truth as matter of fact. It is as if one should demur to a complaint on the ground that it did not state facts sufficient to constitute a cause of action, and then seek to sustain the demurrer on appeal in this court by showing that, in an after action, it was proved that the facts pleaded were not true. The jurisdiction of the county judge depended upon the sufficiency of the allegations and not upon their truth; upon the paper presented, not upon the facts behind it. What possible protection could the adjudication of the county judge give if its correctness could always be assailed under the guise of an inquiry into a jurisdictional fact? The statute is not perhaps very accurately or happily expressed, but its meaning is not doubtful. Jurisdiction attaches whenever a petition is presented, signed by such a number of tax-payers as may constitute the required majority, and sworn to be such by one of the signers. That makes a prima facie case. That protects against an absurd or idle application. Thereupon the duty of the county judge begins, and he is left to decide whether the asserted majority is, in truth,

the real and lawful majority. This construction was recognized in People, ex rel. Rogers, v. Spencer, 55 N. Y. 1, cited in the prevailing opinion. The language of the court was carefully phrased so as to avoid giving countenance to the idea that jurisdiction depended in any manner upon the truth of the allegations.

These views clear the way to what I conceive to be the true question to be considered, which is the sufficiency of the petition on its face, and that alone. There were about two hundred signers in all. Fifty or sixty of them signed upon condition; one hundred and fifty absolutely and without condition. The county judge could not judicially know that the one hundred and fifty were not a majority in number and amount of the whole number of tax-payers on the assessment-roll. They, at least, signed absolutely. If the other fifty names had not been signed at all, the petition signed by the one hundred and fifty would assuredly have given jurisdiction. The proposition then comes down to this: that the consent of the one hundred and fifty is annulled by the presence on the same paper of the names of fifty persons who did not legally consent at all. To my mind the suggestion is a very serious one, because necessarily the same result would follow if but one name had a condition attached, and a case might arise where, of five hundred tax-payers in a town, four hundred and ninety-nine signed absolutely and one upon condition, and because of that one consent which was not a consent, legally considered, the bonding would be void for want of jurisdiction. It seems to me that if, as is contended, the fifty who did not sign absolutely did not consent, then simply the petition must be treated as not signed by them at all. The condition which annulled their consent could have no greater force than if they had withheld their names entirely, and in that event jurisdiction would have been obtained. I cannot help regarding it as an unsound proposition that the lawful application of the one hundred and fifty is vitiated because fifty more undertook to join in, but failed legally to express their consent. That failure might or might not become important upon the hearing after jurisdiction obtained; for the statute itself permits, upon that hearing, tax-payers, who did not join in the petition, to come in before the court and signify their consent, and make that consent effective. And this provision is very strong proof that the county judge is not barred from jurisdiction to inquire, because he sees on the face of the paper a mode of signature which may or may not affect the ultimate result of his inquiry.

But I have not as yet done full justice to the doctrine of the majority. It has another phase, which seems to me the only one having any real importance. It is claimed that the petition asserts merely, and verifies merely, that the whole number of signers constitute a majority of the tax-payers; and since some of them signed ineffectively and cannot be counted, it follows that the petition

does not allege nor verify that the remainder still constitute a majority. This is a technical and artificial construction of the language of the petition, and impresses upon it a meaning which does not at all belong to it. If it be a sound construction it probably destroys every bonding petition which has ever been presented, since it is difficult to imagine that any one application has been made which did not contain some one defective, or invalid, or ineffectual consent. The question, therefore, assumes a very grave importance. The position of my brethren with whom I differ rests upon the words in the petition "the undersigned," which are assumed to mean "the whole of the undersigned," or all of them taken together, without rejection of a single name. No such meaning belongs to the phrase as used in the petition, nor was it within the contemplation of the applicants or the affiant. The latter did not mean to verify that persons desired to bond the town whose signature, with a condition, showed that they did not legally desire it at all. What he did mean, and what he must be held to have verified, is, that enough of "the undersigned" had consented, that is, effectively consented, to constitute a majority in number and amount of the tax-payers. He swears simply, and the petition avers, that there, on the paper, are the names of a majority who desire the bonds to be issued. The petition does not say, and was not required to say, how large a majority. It does not purport that every name attached is essential to the existence of such majority. It does not warrant, at the peril of a total failure of the application, that there is no name among "the undersigned" ineffectively signed. It does not assert that there is a bare majority which will not admit of the rejection of a single name. What the petition asserts, and what the affiant verifies is, that there, before the county judge, lie the consents of a majority of the tax-payers; that a majority have consented, have expressed their desire, and have done so effectively. No other construction is either reasonable or just, and the technical one, asserted after ten years of silence and payment by the town, should be rejected.

But I go further even than this. I am satisfied that upon the technical construction, which I reject, the allegations of the petition and of the affiant were sufficient. The county judge had no right to assume that the desire of the fifty-three signers to bond the town was annulled or effaced by the condition annexed, and that these signatures were not effective, and could not be counted. Let it be steadily borne in mind that the precise question here is whether the petition gave to the county judge jurisdiction to institute an inquiry. When he made his final order the act of 1871 was in force, and the conditional desires were lawful and could be effectively counted, so that what transpired six days before that act took effect was that the county judge received the petition, and gave the required notice that he should proceed to

inquire into its truth. Had he jurisdiction to institute that inquiry is, therefore, the exact question before us. I maintain that, at that point of the proceeding, the county judge had no right to reject the names of the fifty-three conditional signers as ineffective and invalid, nor have we any such right on this appeal. Thirty-seven persons on one paper added "on condition that said road is located by Fish lake and Shavertown." Six more added the same condition, appending only after the word "Shavertown," the words "or village." And ten more said "above conditions shall be null and void unless said road shall be located by Shavertown and Lumberville." The word "conditions" I am ready to concede is a misprint for, or at least means "consents." Now, as this petition, treated as a whole, lay before the county judge, I insist that it was "absolute in form." As signed by the one hundred and fifty it was certainly so. The conditional signers were on separate papers, and added to the absolute form a qualifying condition. But this qualification affected only their individual signatures, and not at all the averment of the petition, or the scope of the verification. The legal effect was the same as if there had been but one paper, absolute in form, which the whole two hundred had signed, but fifty-three signatures had conditions annexed to their individual names. The consequence would be to affect the validity of those signatures, but not the absolute averment of the petition, or assertion of the verification. These would still allege that the undersigned constituted a majority and desired the bonding, that is, absolutely desired it. The county judge might think the averment untrue on observing the conditional signatures, but for the purpose of jurisdiction to inquire, the question of truth or falsity was not before him. The averment of an absolute desire by the signers constituting a majority was there, and no refinement can argue it out. Whether it was true or not by reason of conditional signatures was one of the very questions to be investigated after inquiry begun. Indeed, with the paper before him, the county judge could not even say that the conditional signatures did not express an absolute desire for the issue of bonds in aid of the railroad, and operate as absolute consents to such issue. With nothing before him but the paper and its verified averments had he a right to assume, or can we decide that it was his duty to assume, that the conditions were not already performed when the consents were signed, and so the consents were not in fact absolute? For a condition already performed in no manner qualifies the consent. In such event the consent is absolute the instant it is given. If I should follow the example set by the prevailing opinion, and resort to the evidence on this trial for information, I should discover that the railroad was in fact located on the precise line indicated by the conditions, and nothing appears anywhere to show that it was not so located at the very

moment the conditional signers appended their names, they not having seen the map filed and knowing nothing of the exact alignment. But without doing what I hold to be improper, it is still true that when the county judge was presented with the petition and asked to enter upon the inquiry authorized by law, he had no right to assume that the conditional signatures were not in truth absolute, that the condition had not been performed already, and so was extinguished and did not qualify the consents. The petitioners asserted that they all consented, or rather, following the precise phrase of the statute, that they all desired the creation and issue of the bonds. Their allegation gave jurisdiction, since the county judge could not say, in advance of inquiry and proof, that every signature was not the expression of an absolute desire; since he could not know that the condition was unperformed; since it was the right of the fifty-three to insist that they should be counted, and to prove the facts on the hearing which should establish that right. The officer could not say as matter of law that those signatures were ineffectual to set in motion a judicial inquiry whether in fact a majority had legally consented; for I think it not at all doubtful if the act of 1871 had never been passed, but it was proved on the hearing that when the petition was presented the railroad company had already actually located their line in accordance with the alleged conditions, utterly uninfluenced and unaffected by them, because not then in existence, and so without any question of public policy to intervene, that in such case the entire consents could be counted as all absolute, unqualified and dependent upon nothing in the future for their efficacy.

Upon our consultation over this case I expressed the opinion that the act of 1870 legalized conditions, and that the suggestion of Judge DANIELS to that effect in People, ex rel. Hoag, *v.* Peck, 4 Lans. 528, was correct. I still think so, but prefer, without discussing that question, to put my dissent upon the broader grounds which have been stated.

I think the order of the general term was right and should be affirmed.

Order reversed and judgment affirmed.

Doctrine of United States Courts Regarding Recitals.—The doctrine of the United States courts with regard to the effect of recitals is generally disregarded by the State courts, and a failure to comply with the stipulated qualifications and conditions is accordingly held fatal even to a bondholder, notwithstanding the fact that on their face the bonds set out that they were properly issued. Lamoille *v.* Fairfield, 51 Vt. 237; People *v.* Waynesville, 88 Ill. 469; Sykes *v.* Columbus, 55 Miss. 115; Delaware Co. *v.* McClintock, 51 Md. 325; Harding *v.* C., R. I. & St. L. R. Co., 65 Ill. 90; Woodruff *v.* Okaloona, 57 Miss. 806; Cagwin *v.* Town of Hancock, 5 Am. & Eng. R. R. Cas. 150.

A conclusive effect may, however, be conferred by statute upon such

recitals, so that the municipality may be estopped from denying their truth. Mercer Co. v. Hacket, 1 Wall. 83; Lynde v. Winnebago Co., 16 Wall. 6; Rock Creek v. Strong, 96 U. S. 271; Block v. Commissioners, 99 U. S. 686; Munson v. Lyons, 12 Blatch. 539; People v. Mitchell, 35 N. Y. 551; E., I. & C. S. R. R. v. Evansville, 15 Ind. 395; County of Clay v. Society for Savings, 5 Am. & Eng. R. R. Cas. 170. See, further, Comm. v. Pittsburgh, 43 Pa. St. 391; Gilchrist v. Little Rock, 1 Dill. C. Ct. 261; Damelly v. Cabaniss, 52 Ga. 211; Black v. Cohen, 1 Pick. 261; Marshall Co. v. Schenck, 5 Wall. 772. But see Marshall Co. v. Cook, 38 Ill. 44; Shoemaker v. Goshen, 14 Ohio St. 569; Veeder v. Lima, 19 Wis. 280; Dunnovan v. Green, 57 Ill. 268. See also Keithsburg v. Frick, 34 Ill. 405; Mercer Co. v. Hubbard, 45 Ill. 139; Railroad Co. v. Marion Co., 36 Mo. 294; Beloit v. Morgan, 7 Wall. 619; County of Clay v. Society for Savings, 5 Am. & Eng. R. R. Cas. 170.

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The mode of citing the American and English Railroad Cases is as follows:

15 Am. & Eng. R. R. Cas.

ACCORD AND SATISFACTION.

When sum is received on account of injury without express agreement that it is to be satisfaction, presumption is that it was so intended. Lamont *v.* Washington & G. R. Co., xv. 383.

ACKNOWLEDGMENT.

Where State court has decided that acknowledgment of trust deed giving preference is insufficient, U. S. court will not pass on point anew. Hay *v.* Alexandria & W. R. Co., xv. 647.

ACT OF ASSEMBLY.

See STATUTE.

ADMINISTRATORS AND EXECUTORS.

In action by administrator to recover damages for causing death, payment to widow cannot be pleaded in satisfaction. Burlington, C. R. & N. R. Co. *v.* Dowell, xv. 153.

Administrator cannot recover for personal injuries terminating in death where evidence fails to show that death was not instantaneous. Riley Adm'x *v.* Conn. River R. Co., xv. 181.

AGENCY AND AGENTS.

Judgment against agent for fraud while acting within scope of his agency on which no payment has been made, is no bar to action against the principal, though principal was ignorant of fraud. Maple *v.* Cincinnati, H. & D. R. Co., xv. 94.

Local station-agent has no general authority to contract to furnish cars to shippers at other stations than that at which he is stationed. Missouri Pac. R. Co. *v.* Stults, xv. 97.

Agency cannot be proved by oral declarations of supposed agent. Missouri Pac. R. Co. *v.* Stults, xv. 97.

When plaintiff's witness on cross-examination admitted that he went with person who was agent of company and compromised claim with plaintiff, and company shows that no one had power to effect a compromise, plaintiff may show that party calling on him represented that he had such power. Brownell *v.* Troy & Boston R. Co., xv. 498.

AID BONDS.

See MUNICIPAL SUBSCRIPTIONS.

ANIMALS.

See Crossings; Fences.

Company failing to erect new cattle-guards under agreement with landowner upon removal of his fences is liable for injuries occurring in consequence. Missouri Pac. R. Co. *v.* Lynch, xv. 517.

When colt confined in safe enclosure escapes at night owing to negligence of unknown party in leaving gate open, company is bound to use ordinary care not to run over such colt. Atchison, T. & S. F. R. Co. *v.* Davis, xv. 521.

Where horse gets on track for want of fence and being frightened by approaching train is hurt without coming into contact with train, company is not liable, in default of wilful misconduct of trainmen. Schertz *v.* Indianapolis, etc., R. Co., xv. 523.

Company is bound to use ordinary care and diligence as to cattle rightfully on highway at public crossing. Lane *v.* Kansas City, Ft. S. & G. R. Co., xv. 526.

When cattle killed at crossing by hand-car, speed of which was not diminished until too late, by reason of defective brake, to avoid injury, company was held liable. Missouri Pac. R. Co. *v.* King, xv. 529.

Company is liable for killing of animals at point where it is bound to fence, notwithstanding negligence of owner. Burlington & M. R. Co. *v.* Franzen, xv. 530.

Company is liable for killing of cattle occasioned by failure to fence, notwithstanding fact that owner pastures them in unfenced land contiguous to railway and herd-law is in force forbidding cattle to run at large. Atchison, T. & S. F. R. Co. *v.* Riggs, xv. 531.

Mere fact that owner of cattle knew of company's failure to fence when he turned out cattle to graze on adjoining lands does not relieve company from liability. Cressly *v.* Northern R. Corp., xv. 540.

When animals are killed at crossing through negligence of company, owner may recover damages though he has suffered them to run at large in violation of herd-law. Alabama Great Southern R. Co. *v.* McAlpine & Co., xv. 544.

Company must use extraordinary diligence not to run over cattle at crossings. Alabama Great Southern R. Co. *v.* McAlpine & Co., xv. 544.

Company is only bound to blow whistle or ring bell when engine is within quarter mile of station or crossing. It owes no other duty as to signals to cattle at crossing. Alabama Great Southern R. Co. *v.* McAlpine & Co., xv. 544.

Party having possession of cattle by his servant may bring action for injury to them. Alabama Great Southern R. Co. *v.* Jones, xv. 549.

Letting cattle loose in unfenced field adjoining railroad is not such contributory negligence as will defeat recovery when such cattle are killed by negligence of railroad company. Alabama Great Southern R. Co. *v.* Jones, xv. 549.

When animals were killed on track at night by reason of defective headlight which did not give light far enough ahead to enable engineer to stop train in time. *Held*, that the company was liable. Alabama Great Southern R. Co. *v.* Jones, xv. 549.

Complaint alleging killing of stock by defendant or lessee thereof or some person unknown is bad on demurrer. Wabash, St. L. & P. R. Co. *v.* Rooker et al., xv. 558.

Complaint for killing cattle alleging that railroad was not securely fenced, is good. If road could not be properly fenced at the place, this is matter of defence. Terre Haute & I. R. R. Co. *v.* Penn, xv. 561.

APPEALS.

An order striking out answer is appealable, and need not be excepted to to entitle party to have it reviewed. Harlan *v.* St. Paul, M. & M. R. Co., xv. 180.

Where no exception is taken to refusal to charge as requested, appellate court will not review action of court below. Leahy *v.* Southern Pac. R. Co., xv. 230.

Assignment of error to whole charge is too vague. Houston & T. C. R. Co. *v.* Pinto, xv. 286.

When substantial rights are not affected, action of court below on motion to

APPEALS—*Continued.*

make complaint more certain, will not be reversed. Lehnertz *v.* Minneapolis, etc., R. Co., xv. 370.

When jury has necessarily found all facts in favor of plaintiff, this is binding on appellate court. Lake Erie & W. R. Co. *v.* Zoffinger, xv. 370.

Court will not reverse for improper admission of evidence, if totally immaterial. Lake Erie & W. R. Co. *v.* Zoffinger, xv. 370.

Failure to charge in a certain way can only be assigned for error when a request is made so to charge which is refused. Carter *v.* Columbia & S. C. R. Co., xv. 414.

Judge should state in bill of exceptions that no jury and non-jury docket was kept. Affidavit of clerk to that effect will not be looked to. Dinwiddie *v.* Louisville & N. R. Co., xv. 488.

Overruling of motion to state separately two causes of action in one complaint is not appealable order. Wabash, St. L. & P. R. Co. *v.* Rooker et al., xv. 558.

When cause is tried without jury and there is general finding for defendant in error and no exception by plaintiff in error, latter cannot raise question of law on matter of fact not decided in his favor and not admitted by pleadings. Otoe Co. *v.* Baldwin, xv. 563.

ARBITRATION.

Contract that servant should make deposit and that officer of corporation should be sole judge as to whether corporation was entitled to hold all or any part of it on account of misconduct of servant, is void as ousting jurisdiction of courts. White *v.* Middlesex R. Co., xv. 131.

ARREST.

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Agreement construed to amount to equitable assignment of part of claim to attorney which he might enforce. Canty *v.* Lattemar et al., xv. 380.

ATTORNEY.

Agreement construed as equitable assignment of part of claim to attorney as contingent fee and not champertous. Canty *v.* Lattemar et al., xv. 380.

Attorney may recover sum out of deposit made by company in court prior to agreement. Canty *v.* Lattemar et al., xv. 380.

Parties may compromise case without intervention of attorney, notwithstanding agreement of plaintiff to pay attorney contingent fee. Court will not on that account vacate compromise. Lamont *v.* Washington & G. R. Co., xv. 383.

BACKING TRAINS.

Reversal of engine in switching and making up trains is not negligence per se. Jackson *v.* K. C., L. & S. K. R. R. Co., xv. 178.

When party is injured at crossing by backing cars, foremost of which had no light, though engine had, questions of negligence and contributory negligence were for jury. Rohan *v.* Milwaukee, etc., R. Co., xv. 374.

Company not liable for running over licensee on track with backing train giving signal. Hogan *v.* Chicago, M. & St. P. R. Co., xv. 439.

When company ran train on street without brakeman on foremost car, and in consequence horse was frightened and ran away killing owner, company was held liable. Complaint in this case held sufficiently definite. Johnson *v.* St. Paul & D. R. Co., xv. 467.

When company in backing cars in town was required by law to station man on last car to warn persons off track, and man was stationed on front part of last car; *held*, that the law was not complied with, and the question of negligence was for the jury. Leroy *v.* Midland R. Co., xv. 478.

BILL OF PEACE.

Where party has filed bill of peace and obtained injunction to restrain stockholders of corporation from moving to set aside illegal agreement, he cannot set up laches on their part in not so moving. Metropolitan Elevated R. Co. v. Manhattan R. Co. et al., xv. 1.

Filing of bill of peace is without effect unless preliminary or final judgment be entered. Metropolitan Elevated R. Co. v. Manhattan R. Co. et al., xv. 1.

BLASTING.

When laborer was injured in blasting, through negligence of foreman or local boss *held* company was liable. Gilmore v. Northern Pac. R. Co., xv. 304.

BONDS.

See MUNICIPAL SUBSCRIPTIONS.

BRAKES.

Whether defect in brake could have been discovered by reasonable care on part of company was for jury. Leahy v. Southern Pac. R. Co., xv. 230.

Whether or not brakeman used club to set up brakes contrary to rules was for jury. Leahy v. Southern Pac. R. Co., xv. 230.

Where plaintiff's evidence is contradictory as to whether new form of brake is safer than old one, though more efficacious, there is no evidence of negligence for the jury, in case of injury occasioned by fracture. Disher v. N. Y. Central, etc., R. Co., xv. 233.

In this case evidence held insufficient to identify a rim of a broken brake wheel put in evidence or to warrant conclusion that fracture was caused by defect therein. Disher v. N. Y. Central, etc., R. Co., xv. 233.

When brakeman was injured by defect in brake of damaged car which he was engaged in hauling in company's yard, *held* it was a risk of his employment. Yeaton v. Boston & Lowell R. Corp., xv. 253.

Company held liable for killing cattle with hand car at crossing, owing to defective brake. Missouri Pac. R. Co. v. King, xv. 529.

BRIDGE.

In action by servant to recover for injury occasioned by insufficient stay lath on bridge where he was working, when contributory negligence was set up in using stay-lath as scaffold, and verdict was for plaintiff, new trial was not granted, as it was not clear that verdict would be for defendant on ground of accident. McCune v. Northern Pac. R. Co., xv. 172.

There can be no recovery for death of brakeman on moving train caused by striking a bridge when evidence wholly fails to show that deceased was using due care. Riley, Adm'r, v. Conn. River R. Co., xv. 181.

Company buying its road is bound as to its servants not only to maintain the bridges in as good repair as when purchased, but to supply all patent defects in original construction. Vosburg v. Lake Shore & M. S. R. Co., xv. 249.

Man of intemperate habits was found dead at close of dark night on railroad bridge which he used frequently; *held* that there was no evidence of negligence by railroad company. State v. Phila., W. & B. R. Co., xv. 481.

Company not responsible for death of brakeman occasioned by low bridge of another company crossing their line. Gibson v. Midland R. Co., xv. 507.

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See ANIMALS; CROSSINGS; FENCES.

CHAMPERTY.

Agreement construed not to be champertous and to amount to equitable assignment to attorney of part of claim which he was entitled to enforce. Canty v. Lattemar et al., xv. 380.

CHANCERY.

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CHILDREN.

See PARENT AND CHILD.

Company negligently backing freight car so as to injure minor son of servant of another company assisting his father in repairing car is liable. Penna. Co. *v.* Gallagher, xv. 341.

When deceased was a minor and was killed while coupling cars, declarations by him in his lifetime that he knew how to couple cars are inadmissible. Penna. Co. *v.* Long, xv. 345.

Mother may recover for death of her minor son employed to couple cars without her consent, though not contrary to her known will. Penna. Co. *v.* Long, xv. 345.

Whether company is negligent in setting inexperienced minor to couple cars with different styles of draw-bars—without giving special instructions—is for jury. Penna. Co. *v.* Long, xv. 345.

Mere fact that company employing minor with parent's consent afterwards changes his duties is not negligence. Texas & Pac. R. Co. *v.* Carlton, xv. 350.

Company may employ minor of years of discretion without parent's consent. In case of injury, parent can only set up duty of company to minor as its servant. Texas & Pac. R. Co. *v.* Carlton, xv. 350.

When boy of five under charge of brother of nine was killed at crossing, question whether boys and their parents used due care was for jury. O'Connor *v.* Boston & L. R. Co., xv. 362.

When child strayed from public park on track and was injured, jury may inquire whether injury would or would not have occurred if company had performed its duty and built a guard. Hayes *v.* Michigan Central R. Co., xv. 394.

When child attempted to board moving car and parents knew of danger, *held* they could not recover for injury. Williams *v.* Texas, etc., R. Co., xv. 403.

When child of eighteen months escaped from mother and running on track was injured, *held* it was for jury whether the mother exercised due care. McGeary *v.* Eastern R. Co., xv. 407.

Act making company liable for value of stock killed in case of failure to fence, does not render it liable for injury to child caused by absence of fence only. Walkenhauer *v.* Chicago, B. & Q. R. Co., xv. 490.

CITIES.

See MUNICIPAL SUBSCRIPTIONS.

CONNECTING LINES.

Company need not receive and haul car from connecting line which is so defective as to be dangerous to its servants. Texas & Pac. R. Co. *v.* Carlton, xv. 350.

CONSOLIDATION.

Franchises and privileges of old companies are merged and exist in new company. Green Co. *v.* Conness, xv. 613.

CONSTITUTIONAL LAW.

Legislature may authorize municipality to issue aid bonds and to levy tax to pay same with or without popular vote, and may by retrospective act validate defective bonds irregularly issued. Otoe Co. *v.* Baldwin, xv. 563.

Act may authorize issue of municipal aid bonds and also legalize defective bonds already issued. Otoe Co. *v.* Baldwin, xv. 563.

Constitution of Nevada does not permit county to increase existing indebtedness without legislative sanction. Right of legislature to grant such power is limited. Dixon Co. *v.* Field, xv. 595.

Act entitled "An act to amend charter of the C. & St. L. R. Co." may

CONSTITUTIONAL LAW—*Continued.*

contain provisions legalizing invalid municipal elections to subscribe to company's stock. Jonesboro *v.* Cairo & St. L. R. Co., xv. 615.

CONTRACT.

See CONTRACTOR; ILLEGAL CONTRACT.

CONTRACTOR.

Company liable for injury to person caused by fall of derrick furnished by company to contractor which was obviously defective when delivered to contractor. Conlon *v.* Eastern R. R. Co., xv. 99.

Corporation is liable for negligence or misconduct of servant or contractor in same cases as natural person. Hughes *v.* Cincinnati & S. R. Co., xv. 100.

Corporation contracting with independent contractor to build road, not retaining right to control mode or manner of doing work, is not liable for injury occasioned by negligence of the contractor. Aliter where it retains right to control mode or manner of doing work. Hughes *v.* Cincinnati & S. R. Co., xv. 100.

Reservation in contract of right to direct quantity of work to be done or condition of work when completed does not render company liable for negligence of contractor. Hughes *v.* Cincinnati & S. R. Co., xv. 100.

Where company retains control over mode of doing certain part of work only, it is not liable for negligence of contractor in performing another part. Hughes *v.* Cincinnati & S. R. Co., xv. 100.

Company is not liable for negligence of an independent contractor as regards real estate unless work is per se a nuisance or injury necessarily results from the doing of the work in the manner specified by the contract. Hughes *v.* Cincinnati & S. R. Co., xv. 100.

Where contractor to construct road assigned contract to president of railroad company who proceeded to construct same, corporation was liable for injury to servant caused by negligence in course of construction. Solomon R. R. Co. *v.* Jones, xv. 201.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE (CONTRIBUTORY).

CORPORATION.

Is not estopped to move to have contract entered into by its officers set aside on the ground of fraud. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

Moving to have illegal contract of officers set aside is not debarred by judgment entered with assent of said officers affirming validity of contract entered into as aforesaid. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

Is liable for negligence or misconduct of servant or contractor as a natural person. Hughes *v.* Cincinnati & S. R. Co., xv. 100.

Company is liable for injury caused by fall of derrick furnished by it to contractor when same was obviously defective at time of delivery to contractor. Conlon *v.* Eastern R. Co., xv. 99.

In absence of evidence to contrary, it will be presumed that company built road and company is liable accordingly for injuries to servants caused by defects in hand-car used in construction of road. Solomon R. R. Co. *v.* Jones, xv. 201.

Where contractor to construct railroad assigned contract to president of railroad company who proceeded to construct same, corporation was liable for injury to servant occasioned by negligence in course of construction. Solomon R. R. Co. *v.* Jones, xv. 201.

COUNTIES.

See MUNICIPAL SUBSCRIPTIONS.

COUPLING CARS.

Evidence as to usual mode of coupling and uncoupling cars at particular switch is not admissible to show that party was not guilty of contributory negligence. Chicago, etc., R. Co. *v.* Clark, xv. 261.

When party crushed against platform, *held* that if he was not guilty of contributory negligence, company was not guilty of negligence. Chicago, etc., R. Co. *v.* Clark, xv. 261.

When injury was occasioned in coupling cars by unblocked frogs, witness cannot be asked what danger is from that source or whether a person coupling cars could see frogs on track. Burlington, C. R. & N. R. Co. *v.* Coates, Adm'r, xv. 265.

When servant had notice of danger from unblocked frogs and was killed, administrator must prove freedom from contributory negligence. Burlington, C. R. & N. R. Co. *v.* Coates Adm'r, xv. 265.

When party killed in coupling cars by projecting timbers. *Held*, evidence tended to show negligence on part of company and did not necessarily show contributory negligence by deceased. Brown *v.* Atchison, T. & S. F. R. Co., xv. 271.

Measure of care required on part of railroad company to its servants is ordinary care. Where party injured is guilty of contributory negligence, he may nevertheless recover in case of gross negligence. Louisville, etc., R. Co. *v.* McCoy, xv. 277.

When brakeman fell into ditch and evidence was conflicting as to how far he knew of condition of road, verdict was left undisturbed. Houston & T. C. R. Co. *v.* Pinto, xv. 286.

Brakemen negligently stepping between cars may nevertheless recover for subsequent injury occasioned by backing up of cars before he gives the signal. Romick *v.* Chicago, R. I. & P. R. Co., xv. 288.

In action for injury while coupling cars, court will not strike out allegation in complaint that draw-bars were "defective and insufficient." Tierney *v.* Burlington, C. R. & N. R. Co., xv. 290.

When deceased was a minor and was killed while coupling cars, declarations by him that he knew how to couple cars are inadmissible. Penna. Co. *v.* Long, xv. 345.

Mother may recover for death of her minor son employed to couple cars without her consent, though not contrary to her known will. Penna. Co. *v.* Long, xv. 345.

Whether company is negligent in setting minor to work to couple cars with different styles of draw-bars and without special instructions, is for jury. Penna. Co. *v.* Long, xv. 345.

COURTS.

See JURISDICTION; UNITED STATES COURTS.

CRIMINAL LAW.

In suit to recover damages for killing person on track in Tennessee through failure to observe statutory precaution, same measure of proof is not necessary as to convict engineer of felony. East Tenn., Va. & Ga. R. Co. *v.* Humphreys Adm'r, xv. 472.

CROSSING.

See LIGHTS; SIGNALS; DUTY OF COMPANY.

Failure of engineman to sound statutory signal on approaching crossing does not render company liable for injury occasioned thereby to brakeman who is fellow-servant. Randall *v.* Baltimore & Ohio R. Co., xv. 243.

Company moving and switching cars after dark at crossing in city, bound to take means to notify public and prevent accident. Peoria & P. U. R. Co. *v.* Clayberg, xv. 356.

In action for injury at crossing of private way at grade when plaintiff relies upon negligence of engineer and want of flagman, defendant is not entitled to

CROSSING—*Continued.*

ruling that if engineer used reasonable care plaintiff could not recover. O'Connor *v.* Boston & L. R. Co., xv. 362.

In action for injury at crossing of private way at grade, court should not charge that company is bound to exercise same care at crossing that person using it is bound to use to avoid injury. O'Connor *v.* Boston & L. R. Co., xv. 362.

Allegation that railroad was so negligently constructed at crossing that train could not be seen by person on highway until so near that it was difficult or impossible to avoid being struck, is sufficiently certain. Lehnertz *v.* Minneapolis, etc., R. Co., xv. 370.

When car was moving too swiftly, no bell was rung, and there was no light on forward car, this constituted negligence. Lake Erie & W. R. Co. *v.* Zoffinger, xv. 370.

When party injured at crossing by backing cars foremost of which had no light, though engine had, question of negligence was for jury. Rohan *v.* Milwaukee, etc., R. Co., xv. 374.

Statute requiring signal on approaching crossing is intended only to provide warning to those crossing or intending so to do. It does not apply when by reason of failure to give signal parties are induced to approach so closely that their horses are frightened by noise of train and so injury ensues. Rosenberger *v.* Grand Trunk R. Co., xv. 448.

When company failed to provide flagman at crossing, it was liable for injury occasioned by frightening of horse in consequence. Complaint *held* sufficiently definite. Johnson *v.* St. Paul & D. R. Co., xv. 467.

When company in backing cars in town was required by law to have man stationed on last car to warn persons off track and man was stationed on front part of last car. *Held*, that law was not complied with, and question of negligence was for jury. Levoy *v.* Midland R. Co., xv. 478.

CONTRIBUTORY NEGLIGENCE.

In action for killing at crossing, habits of deceased as to jumping on trains in motion are inadmissible to prove contributory negligence. Peoria & P. U. R. Co. *v.* Clayberg, xv. 356.

Company put up sign at crossing of much travelled private way: "This is not a public way and is dangerous." *Held*, as matter of law, court could not say it was a denial of right to cross, and that person crossing did so at his own risk. O'Connor *v.* Boston & L. R. Co., xv. 362.

When boy of five under charge of brother of nine was injured at crossing, question whether boys and their parents exercised due care was for jury. O'Connor *v.* Boston & L. R. Co., xv. 362.

Declaration of bar-keeper immediately before accident that plaintiff had had enough was inadmissible to prove drunkenness. Lake Erie & W. R. Co. *v.* Zoffinger, xv. 370.

When party injured at crossing by backing cars, foremost of which had no light, though engine had, question of contributory negligence was for jury. Rohan *v.* Milwaukee, etc., R. Co., xv. 374.

DUTY AS TO ANIMALS.

Company bound to use ordinary care and diligence as to cattle rightfully on highway at public crossing. Lane *v.* Kansas City, Ft. S. & G. R. Co., xv. 526.

When cattle killed at crossing by hand-car running at high rate of speed, which could not be stopped in time owing to defective brake, company was held liable. Missouri Pac. R. Co. *v.* King, xv. 529.

When animals are killed at crossing through negligence of company, owner may recover damages though he has suffered them to run at large in violation of herd-law. Alabama Great Southern R. Co. *v.* McAlpine & Co., xv. 544.

Company must use extraordinary diligence not to run over cattle at crossings. Alabama Great Southern R. Co. *v.* McAlpine & Co., xv. 544.

Company is bound as to cattle at crossings only to give signals when within a quarter of a mile, under Alabama statute. Alabama Great Southern R. Co. *v.* McAlpine & Co., xv. 544.

DAMAGES.

See DEATHS.

Exemplary damages are recoverable in case of gross negligence. Louisville, etc., R. Co. *v.* McCoy, xv. 277.

Verdict of $10,000 for injuries to brakeman causing permanent disability not excessive. Atchison, T. & S. F. R. Co. *v.* Moore, xv. 312.

DEATH.

See EXECUTORS AND ADMINISTRATORS.

In action by administrator to recover damages for causing death, payment to widow cannot be pleaded in satisfaction. Burlington, C. R. & N. R. Co. *v.* Dowell, xv. 153.

Action cannot be maintained for personal injuries resulting in death where evidence fails to show that death was not instantaneous. Riley, Adm'x, *v.* Conn. River R. Co., xv. 181.

In action to recover damages for death, evidence is admissible as to condition of remains of deceased. Leahy *v.* Southern Pacific R. Co., xv. 230.

Life-tables are admissible to show expectancy of life of brakeman. Burlington, C. R. & N. R. Co. *v.* Coates, Adm'r, xv. 265.

Instruction as to damages should be more definite than that they must compensate loss sustained. Burlington, C. R. & N. R. Co. *v.* Coates, Adm'r, xv. 265.

In action for death, motion will not lie for nonsuit on ground of contributory negligence. Carter *v.* Columbia & G. R. Co., xv. 414.

Loss of society and protection of deceased to her children cannot be compensated in damages. Only such damage is recoverable as deceased could have claimed had she lived. Nashville & C. R. Co. *v.* Smith, xv. 469.

No action lies except under the statute, and right to recovery is governed by law of place where injury occurred. Hyde *v.* Wabash, St. L. & P. R. Co., xv. 503.

Mother has no right to recover for death of her illegitimate son. Gibson *v.* Midland R. Co., xv. 507.

In action by administrator for death, loss or injury to children or next of kin is not an element of damage. Chicago, St. L. & N. O. R. Co. *v.* Pound's Adm'r, xv. 510.

When injury occasioning death has occurred, subsequent statute giving new cause of action has no application. Chicago, St. L. & N. O. R. Co. *v.* Pound's Adm'r, xv. 510.

Cause of action must be stated with reasonable certainty, alleging particular duty and a breach thereof. Addison, Adm'r, *v.* Lake Shore & M. S. R. Co., xv. 512.

Complaint stating names of next of kin and relationship to deceased and alleging damage to them is sufficient. Barnum, Adm'x, *v.* Chicago, M. & St. P. R. Co., xv. 513.

DEFECTIVE CARS.

Servant does not assume all risks in going under defective car on siding to repair same. Where rule is to have watchman to protect such car and company fails to do so and injury occurs in consequence, question of negligence is for jury. Luebke *v.* Chicago, M. & St. P. R. Co., xv. 183.

Company not liable for injury to servant from defect in car received from another company. It is bound only to provide suitable and competent inspectors of such cars. Mackin *v.* Boston & Albany R. Co., xv. 196.

DERRICK.

Company is liable for injury caused by fall of derrick furnished by it to contractor when same was obviously defective at time of delivery to contractor. Conlon *v.* Eastern R. Co., xv. 99.

When servant is employed in operating derrick and is with others charged with duty of keeping rope wet, and it fails to do so and rope breaks, injuring servant, he cannot recover. Union Pac. R. Co. *v.* Fray, xv. 158.

DIRECTORS.

See Officers.

ELECTION.

See Municipal Subscriptions.

When minutes of board of directors show that director voted a certain way and minutes are read and approved at subsequent meeting in presence of that director and others, court will decide that director so voted notwithstanding parol evidence to contrary. Metropolitan Elevated R. Co. v. Manhattan R. Co. et al., xv. 1.

EMINENT DOMAIN.

A husband whose homestead is taken may dispose of compensation without consent of his wife. Canty v. Lattemar et al., xv. 380.

EQUITY.

See Bill of Peace; Injunction.

When bill contains no equity but evidence shows that complainant is entitled to legal relief, bill will not be dismissed. Metropolitan Elevated R. Co. v. Manhattan R. Co. et al., xv. 1.

Will not interfere at instance of stockholders to annul agreement modifying lease, unless rights of third parties intervene. Metropolitan Elevated R. Co. v. Manhattan R. Co. et al., xv. 1.

ERRORS AND APPEALS.

See Appeals.

ESTOPPEL.

Corporation is not estopped from applying to have contract or agreement entered into by its directors set aside on the ground of fraud. Metropolitan Elevated R. Co. v. Manhattan R. Co. et al., xv. 1.

New board of directors not estopped to take steps to annul contract entered into by old board. Metropolitan Elevated R. Co. v. Manhattan R. Co. et al., xv. 1.

Company not party to suit not bound by decree entered in pursuance of agreement to which it was a party. Metropolitan Elevated R. Co. v. Manhattan R. Co. et al., xv. 1.

Corporation moving to have contract of officers set aside is not debarred by judgment entered with assent of officers affirming validity of contract. Metropolitan Elevated R. Co. v. Manhattan R. Co. et al., xv. 1.

Verified petition of party in one case when offered in evidence against him in another case does not operate by way of estoppel. Solomon R. R. Co. v. Jones, xv. 201.

Municipality is estopped by recitals of election in bonds to deny that same was held in statutory manner, but it is not estopped to set up lack of power to issue the bonds. Northern Bank of Toledo v. Trustees, xv. 575.

Township is not estopped by recitals in bonds not signed by town clerk as required by law. Bissell v. Township of Spring Valley, xv. 585.

Municipality is not estopped to deny facts contained in certificate of State officers registering bonds as to regularity of issue. Dixon Co. v. Field, xv. 595.

Recitals in municipal aid bonds only estop corporation to deny facts which corporate officers had by law authority to determine and to certify to. Dixon Co. v. Field, xv. 595.

Recital that bond is authorized by certain statute does not estop county to show that issue was not authorized by vote of two thirds of inhabitants as required by constitution. Carroll Co. v. Smith, xv. 606.

Town is not estopped by recitals in aid bonds that all necessary legal steps have been taken as to their issue. Craig v. Andes, xv. 662.

EVIDENCE.

When minutes of board of directors show that director voted a certain way and minutes are read and approved at subsequent meeting in presence of that director and others, court will decide that director so voted notwithstanding parol evidence to contrary. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

Agency cannot be proved by oral declarations of supposed agent. Missouri Pac. R. Co. *v.* Stults, xv. 97.

Verified petition of one party to cause is admissible in evidence on trial of another cause against such party as statement or admission, but is not conclusive and carries nothing of estoppel. Solomon R. R. Co. *v.* Jones, xv. 201.

In action to recover damages for death, evidence is admissible as to condition of remains of deceased. Leahy *v.* Southern Pacific R. Co., xv. 230.

Evidence in this case held insufficient to identify rim of fractured brake wheel or to warrant conclusion that fracture was caused by defect therein. Disher *v.* N. Y. Central, etc., R. Co., xv. 238.

Declarations of engineer at time of accident as to cause are admissible as part cf res gestæ. McLeod *v.* Ginther's Admr , xv. 291.

In action by mother to recover damages for death of minor son, while coupling cars, declarations by deceased that he knew how to couple cars are inadmissible. Penna. Co. *v.* Long, xv. 345.

Declaration of bar keeper immediately before accident that party had had enough was inadmissible to prove drunkenness. Lake Erie & W. R. Co. *v.* Zoffinger, xv. 370.

When plaintiff's witness on cross-examination testified that he went with person purporting to be agent of railroad company and agreed with plaintiff as to compromise and company showed that no one had authority to compromise with plaintiff, latter may show that agent calling on him represented that he had such authority. Brownell *v.* Troy & Boston R. Co., xv. 498.

Circular not proved to be issued by company defendant is not admissible to show that it is lessee of road and liable under stock laws as such. Atchison, T. & S. F. R. Co. *v.* Cruzen, xv. 515.

EXECUTORS.

See EXECUTORS AND ADMINISTRATORS.

FEDERAL COURTS.

See UNITED STATES COURTS.

FELLOW-SERVANTS.

See SERVANTS.

FEME COVERT.

See HUSBAND AND WIFE.

FENCES.

See ANIMALS.

Where city in granting right of way to railroad in streets requires fences to be erected and covenants to be signed in terms of ordinance, any person suffering injury through want of fences may recover damages. Hays *v.* Michigan Central R. Co., xv. 394.

When child strayed from public park on track and was injured, jury may inquire whether injury would or would not have occurred if company had built guard as required by ordinance. Hays *v.* Michigan Central R. Co., xv. 394.

Act making company liable for value of stock killed in case of failure to fence does not render it liable for injury to infant child caused by absence of fence only. Walkenhauer *v.* Chicago, B. & Q. R. Co., xv. 490.

Company failing to erect new cattle-guards under agreement with landholder

FENCES—*Continued.*

upon removal of his fences, is liable for injuries occurring in consequence. Missouri Pac. R. Co. *v.* Lynch, xv. 517.

In order to enable land-owner building fence on default of railroad company to do so, to recover penalty of twice the cost, he must build the fence strictly in accordance with statute on both sides of right of way. Wabash, St. L. & P. R. Co. *v.* Zeigler, xv. 519.

When colt confined in safe enclosure escapes at night owing to negligence of unknown party and gets upon track, company is bound to use ordinary care not to run over it. Atchison, T. & S. F. R. Co. *v.* Davis, xv. 521.

When horse gets on track for want of fence and is injured without coming into contact with train, company is not liable unless train men have been guilty of wilful misconduct. Schertz *v.* Indianapolis, etc., R. Co., xv. 523.

When animals are killed on track by train at point where company is bound to fence, company is liable notwithstanding negligence of owner. Burlington & M. R. Co. *v.* Franzen, xv. 530.

Company is liable for killing of cattle occasioned by failure to fence, notwithstanding fact that owner pastures them in unfenced land contiguous to railroad and track and herd-law is in force forbidding cattle to run at large. Atchison, T. & S. F. R. Co. *v.* Riggs, xv. 531.

Mere fact that owner of cattle knew of company's failure to fence when he turned cattle out to graze on adjoining lands does not exempt company from liability. Cressly *v.* Northern R. Corp., xv. 540.

Complaint for killing cattle alleging that railroad was not securely fenced is good. If road could not be properly fenced at the place, this is matter of defence. Terre Haute & I. R. Co. *v.* Penn, xv. 561.

FIRE.

Company is not liable for damage occasioned by spreading of fire kindled by section men repairing road under section foreman, in order to prepare food. Marrier *v.* St. Paul, M. & M. R. Co., xv. 135.

Company is not liable for fire occasioned by sparks when the engine is of approved construction and in good condition and it does not appear that engineer was guilty of mismanagement. Atchison, T. & S. F. R. Co. *v.* Riggs, xv. 531.

FRAUD.

When officers of corporation enter into agreement, corporation itself is not estopped to subsequently move to have agreement set aside as fraudulent. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

The evidence held insufficient to establish fraud on part of directors in leasing road and subsequently materially modifying the lease by agreement. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

Judgment against agent for fraud while acting within scope of his authority, on which no payment has been made, is no bar to action against principal, though principal was ignorant of fraud. Maple *v.* Cincinnati, H. & D. R. Co., xv. 94.

In action for fraud where petition states that fraud was not discovered until within four years before suit brought, answer charging that cause of action did not accrue within four years before suit brought because fraud was not committed within said time is insufficient. Maple *v.* Cincinnati, H. & D. R. Co., xv. 94.

FRIGHTENING HORSES.

Statute requiring sign-boards and signals has no application in case of person travelling on road near and parallel to track. East Tenn., V. & G. R. Co. *v.* Feathers, xv. 446.

Statute requiring signal on approaching crossing is only intended to provide warning to those about to cross. It has no application where, by reason of failure to sound signal, parties are induced to approach so close that their horses are

FRIGHTENING HORSES—*Continued.*

frightened by sound of train, and so injury occurs. Rosenberger *v.* Grand Trunk R. Co., xv. 448.

Company held liable for death of person driving horse in street, which horse ran away, frightened by reason of construction of tracks, failure to provide flagman at crossing, and moving of train without brakeman in front. Complaint in this case held sufficiently definite. Johnson *v.* St. Paul & D. R. Co., xv. 467.

Court will take judicial notice of fact that box car at crossing in state of rest is not per se calculated to frighten horses. Gilbert *v.* Flint & P. M. R. Co., xv. 491.

FROGS.

Witness cannot be asked what danger is to person coupling cars from unblocked frogs, or whether such person can see frogs on track. Burlington, C. R. & N. R. Co. *v.* Coates Adm'r, xv. 265.

Where injury was occasioned by unblocked frog, rule of company may be put in evidence to block all frogs. Burlington, C. R. & N. R. Co. *v.* Coates, Adm'r, xv. 265.

Where servant coupling cars had notice of danger from unblocked frogs and was killed thereby, burden is on his administrator to disprove contributory negligence. Burlington, C. R. & N. R. Co. *v.* Coates, Adm'r, xv. 265.

HAND-CARS.

Repairman injured while travelling on hand-car by collision with extra train running without notice according to custom of company, *held* to have run risk of his employment, and not to be entitled to damages. Penna. R. R. Co. *v.* Wachter, xv. 188.

Company liable to servant injured by latent defect in hand-car which has not been properly inspected after collision causing patent defects. What is proper inspection is for jury. Solomon R. R. Co. *v.* Jones, xv. 201.

When section foreman is injured by defect in hand-car, he is not debarred from recovery on ground that it is his duty to supervise repairs of hand-cars on his section. Texas & Pac. Ry. Co. *v.* Kane, xv. 218.

When servant complains of defect in hand-car, and officer promises that it shall be remedied, servant may, without contributory negligence, continue to use hand-car for reasonable time. Texas & Pacific Ry. Co. *v.* Kane, xv. 218.

When servant knows of defect in hand-car and continuing to use it, is injured in consequence, he cannot recover. East Tenn., etc., R. Co. *v.* Smith, xv. 224.

Servant continuing to ride in steam hand-car, wheels of which had patent defect, *held* debarred from recovering for injury thereby occasioned. McQueen *v.* Central Branch Northern Pacific R. Co., xv. 226.

HIGHWAYS.

See STREETS.

HOMESTEAD.

When husband's homestead is taken by process of eminent domain, he may dispose of proceeds without his wife's consent. Canty *v.* Lattemar et al., xv. 380.

HORSE CARS.

See STREET CARS.

HORSES.

See FRIGHTENING HORSES.

HUSBAND AND WIFE.

Wife has no right to compensation paid husband for taking his land for homestead purposes. Canty *v.* Lattemar et al., xv. 380.

ICE AND SNOW.

Brakeman was directed by engineer to look back at point where track ran between high banks of snow. He stepped to side, fell, and was killed. There was nothing to show that he had been struck by snow-bank. *Held* that there was no evidence of negligence on part of company. Burlington, C. R. & N. R. Co. v. Dowell, xv. 153.

Company is not negligent to servants in letting snow-bank stand as left by snow-plough. Burlington, C. R. & N. R. Co. v. Dowell, xv. 153.

ILLEGAL CONTRACT.

As to the right to set aside and method of setting aside an illegal contract entered into by the officers of a corporation. Metropolitan Elevated R. Co. v. Manhattan R. Co. et al., xv. 1.

Contract that servant should make deposit and that officer of company should be sole judge as to whether company was entitled to hold all or any part of it on account of misconduct of servant, is void, as ousting jurisdiction of courts. White v. Middlesex R. Co., xv. 131.

INDICTMENT.

See CRIMINAL LAW.

INFANTS.

See CHILDREN; PARENT AND CHILD.

INJUNCTION.

Where party has filed bill of peace, and obtained injunction to restrain stockholders of corporation from moving to set aside illegal agreement, he cannot set up laches on their part in not so moving. Metropolitan Elevated R. Co. v. Manhattan R. Co. et al., xv. 1.

Issuing of temporary injunction to restrain municipal officers from issuing aid bonds does not prevent bona-fide holder of bonds issued after injunction from maintaining title. Carroll Co. v. Smith, xv. 606.

Where town commissioners issue bonds without obtaining consent of stockholders, and fail to seal them, township will be enjoined from defending on that ground against a bona-fide holder. Bernards Township v. Stebbins, xv. 634.

INSURANCE.

When person was killed in running on track in front of train in night to board train moving in opposite direction on parallel track, there can be no recovery under insurance policy containing clause that company shall not be liable where death is occasioned by exposure to obvious or unnecessary danger. Tuttle v. Traveller's Ins. Co., xv. 488.

JUDGMENT.

Company not party to suit not bound by decree therein entered in pursuance of agreement to which it was a party. Metropolitan Elevated R. Co. v. Manhattan R. Co. et al., xv. 1.

Bill of peace ineffectual without entry of preliminary or final judgment. Metropolitan Elevated R. Co. v. Manhattan R. Co. et al., xv. 1.

Corporation moving to have illegal contract entered into by its officers set aside is not debarred by judgment entered with assent of officers affirming validity of contract. Metropolitan Elevated R. Co. v. Manhattan R. Co. et al., xv. 1.

Judgment against agent for fraud while acting within scope of his authority, on which no payment has been made, is no bar to action against principal, though principal was ignorant of fraud. Maple v. Cincinnati, H. & D. R. Co., xv. 94.

Purchaser of overdue aid bonds held bound by judgment in mandamus pro-

JUDGMENT—*Continued.*

ceedings to which vendor has been party, holding the bonds void. Louis *v.* Brown Township, xv. 630.

Binds all parties having hearing and opportunity to assert rights, though all are defendants in suit and as between them no issue was raised or adverse proceeding had. Louis *v.* Brown Township, xv. 630.

When duly kept alive, retains the lien acquired by its original entry. Hay *v.* Alexandria & W. R. Co., xv. 647.

JURISDICTION.

Court cannot admit a set-off arising out of a distinct ground of action unless it has jurisdiction in such actions, even though defendant declines to ask judgment for possible excess in his favor. Emery *v.* St. Louis, K. & N. W. R. Co., xv. 122.

When complaint states two causes of action, in one of which court has not jurisdiction, demurrer for want of facts does not reach defect, and on trial evidence as to cause of action in which court has no jurisdiction should be excluded. Wabash, St. L. & P. R. Co. *v.* Rooker et al., xv. 558.

Suit in U. S. Circuit Court on municipal bonds by citizen of another State holding bonds by assignment for purposes of suit only, will be dismissed as to bonds owned by citizens of same State as municipality and also as to bonds owned by citizens of other States to a less amount than $500. Bernards Township *v.* Stebbins, xv. 634.

Four judgments were assigned to A, a non-resident. Two belonged to residents and two to non-residents. *Held*, that A might have suit in equity in Federal Court to set aside the entry of fraudulent satisfactions on all four. Hay *v.* Alexandria & W. R. Co., xv. 647.

LACHES.

See LIMITATIONS.

Proceedings instituted by one stockholder to set aside alleged illegal contract of corporation enure to benefit of all. Other stockholders not guilty of laches in failing to institute or join in such proceedings. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

Stockholders are not guilty of laches in failing to act together to set aside illegal corporate agreement. They can only be expected to act together at meeting regularly convened to elect officers. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

When party files bill of peace and obtains injunction to restrain stockholders from bringing suits, he cannot afterwards set up that they are guilty of laches in not bringing such suits. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

LADDERS.

Company not liable for injury to brakeman from defect in ladder on car received from another company. Mackin *v.* Boston & Albany R. R. Co., xv. 196.

Company held liable for death of freight conductor occasioned by defective ladder, he not being negligent in his mode of using same. Richmond & D. R. Co. *v.* Moore's Adm'r, xv. 239.

LEASE.

Where officers of company modify terms of lease, equity will not ordinarily interfere to annul agreement modifying lease, as there is sufficient remedy at law. It will, however, interfere when rights of third parties are involved. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

Where bill is filed to rescind agreement modifying lease, fact that original lease was without authority of law, and that effect of decree sought would be to reinstate it, cannot be set up where it does not follow that such would be

LEASE—*Continued.*

effect of decree. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

The evidence held insufficient to establish fraud on part of directors in leasing road and subsequently materially modifying lease by agreement. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

Directors alone cannot lease road or materially modify existing lease. Stockholders must concur. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

Circular not proved to be issued by defendant is not admissible to prove that it was lessee of road and liable as such. Atchison, T. & S. F. R. Co. *v.* Cruzen, xv. 515.

Complaint alleging killing of cattle by defendant or some lessee thereof or other person unknown, is bad on demurrer. Wabash, St. L. & P. R. Co. *v.* Rooker et al., xv. 558.

LICENSE.

See TRESPASSERS.

As to whether the use of the track of a railroad by public for a long time in this case was evidence of a license or not was for jury. Davis *v.* Chicago & N. W. R. Co., xv. 424.

Licensee assumes risks of business of company whose way he uses, but may recover for injury caused by negligence. Davis *v.* Chicago & N. W. R. Co., xv. 424.

Company not liable for running over licensee on track with backing train giving signal. Hogan *v.* Chicago, M. & St. P. R. Co., xv. 439.

LIFE TABLES.

Are admissible to show expectancy of life of brakeman. Burlington, C. R. & N. R. Co. *v.* Coates, Admr., xv. 265.

LIGHTS.

Company is not liable for injury to repairman on hand-car by reason of failure of fellow-servants on approaching engine to show headlight in foggy weather. Pennsylvania R. R. Co. *v.* Wachter, xv. 188.

Failure to have light on forward car on approaching street crossing *held*, with other facts, evidence of negligence. Lake Erie & W. R. Co. *v.* Zoffinger, xv. 370.

When party injured at crossing by backing cars foremost of which had no light though engine had, questions of negligence and contributory negligence were for jury. Rohan *v.* Milwaukee, etc., R. Co., xv. 374.

Street cars not bound to have such lights as will enable driver with aid of street lights to avoid accident. Memphis City R. Co. *v.* Logue, Admr., xv. 459.

When animals were killed on track at night by reason of defective headlight which did not give light far enough ahead to enable engineer to stop train in time, *held* that company was liable. Alabama Great Southern R. Co. *v.* Jones, xiv. 549.

LIMITATIONS.

See LACHES.

In action for fraud, when petition avers that fraud was not discovered until within four years before suit brought, answer charging that cause of action did not accrue within four years before suit brought, because fraud was not committed within said time, is insufficient. Maple *v.* Cincinnati H. & D. Co., xv. 94.

Two years' limitation applies to actions against railroads for injury occasioned by negligence of a fellow-employee in all cases under Kansas statute. Atchison, T. & S. F. R. Co. *v.* King, xv. 330.

The three years' limitation act to actions for personal injuries in New York *held* applicable, and not the one year act. Watson *v.* 42d St. & Grand St. Ferry R. R. Co., xv. 486.

MALICIOUS PROSECUTION.

Company may maintain action against person maliciously causing arrest of engineer running train. Pleadings need not aver result of defendant's suit against servant when same is admitted to be false and malicious. St. Johnsbury & L. C. R. Co. *v.* Hunt, xv. 113.

MARRIED WOMEN.

See Husband and Wife.

MANDAMUS.

In Kansas, Board of County Commissioners may be compelled by mandamus to levy taxes to meet bonded indebtedness, though there is no vacancy in office of township trustee. Board Co. Comm. Cherokee Co. *v.* Wilson, xv. 625.

When refused on grounds conclusive against right of plaintiff to recover in any action whatever, judgment is conclusive of that fact. Louis *v.* Brown Township, xv. 630.

When used as action at law to recover money, is subject to principles governing other money actions. Louis *v.* Brown Township, xv. 630.

MASTER AND SERVANT.

See Servants.

MEETING.

Stockholders can only be expected to act together at meeting. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

MINUTES.

See Records.

MORTGAGE.

Where city without authority guaranteed payment of interest on railroad bonds and on maturity took and held same, *held* that trust deed given to secure bonds would enure to benefit of city as against subsequent lienholders. Hay *v.* Alexandria & W. R. Co., xv. 647.

MUNICIPAL SUBSCRIPTIONS.

Power to Subscribe and Issue Bonds.

Legislature may authorize municipality to issue aid bonds and to levy tax to pay them, with or without popular vote, and may by retrospective act validate defective and irregular bonds. Otoe Co. *v.* Baldwin, xv. 563.

Act may authorize issue of municipal aid bonds, and also validate such bonds as are irregularly issued. Otoe Co. *v.* Baldwin, xv. 563.

Under terms of law, *held* that townships could not issue aid bonds until county refused to do so or refused within reasonable time to call meeting to consider question. Northern Bank of Toledo *v.* Trustees, xv. 575.

Legislative authority is required for the valid issue of municipal aid bonds. Dixon Co. *v.* Field, xv. 595.

Constitution of Nevada does not allow county to add to existing indebtedness without legislative sanction. Right of legislature to grant such power is limited. Dixon Co. *v.* Field, xv. 595.

The latest decision of State court as to validity of aid bonds will not be followed by the Supreme Court of the United States when in conflict with previous decisions, and when not made at time when rights in suit were acquired. Carroll Co. *v.* Smith, xv. 606; Green Co. *v.* Conness, xv. 613.

Power given by city charter to borrow money and issue bonds therefor does not warrant issue of bonds to pay for subscription to railroad stock. Jonesboro *v.* Cairo & St. L. R. Co., xv. 615.

Where in above case after acquisition of power, constitution was passed pro-

MUNICIPAL SUBSCRIPTIONS—*Continued.*

hibiting municipal subscriptions except where authorized by existing laws, *held* that municipality came under exception. Jonesboro *v.* Cairo & St. L. R. Co., xv. 615.

Act entitled "An act to amend charter of the C. & St. L. R. Co." may contain provisions legalizing invalid municipal elections to subscribe to company's stock. Jonesboro *v.* Cairo & St. L. R. Co., xv. 615.

Power to subscribe in this case was derived from charter of railroad company. Adoption of subsequent constitution requiring vote of people did not affect the power. Howard Co. *v.* Paddock, xv. 621; Dallas Co. *v.* McKenzie, xv. 622.

TO WHAT COMPANY BONDS MAY BE ISSUED.

Where railroad charter gives right to counties to issue aid bonds and company consolidates with another, counties may issue aid bonds to assist consolidated company. Green Co. *v.* Conness, xv. 613.

RATIFICATION.

The act in this case held to validate bonds previously issued irregularly. Otoe Co. *v.* Baldwin, xv. 563.

Where city without authority votes to subscribe for railroad stock, general statute declaring all elections theretofore held valid, cures defects. Jonesboro *v.* Cairo & St. L. R. Co., xv. 615.

ELECTIONS.

Two thirds of the voters actually voting must assent to issue of aid bonds by county. Carroll Co. *v.* Smith, xv. 606.

PROCEEDINGS TO PROCURE ISSUE OF BONDS AND EXECUTION.

Signature of county clerk is essential to validity of bonds, even though he had no discretion to withhold it. Bissell *v.* Township of Spring Valley, xv. 585.

Where orders for subscriptions to stock are made at adjourned and special terms of court, at which judges are present, and last order was made in regular term, it will be presumed that special and adjourned terms were regularly called and held. Dallas Co. *v.* McKenzie, xv. 622.

Judgment of New York county court in proceeding to bond town may be questioned for want of jurisdiction. Burden of proving such want of jurisdiction rests on town. Craig *v.* Andes, xv. 662.

In proceedings in New York to bond a town, jurisdiction is only conferred on county judge when petition is presented in proper form. Judge cannot pass conclusively on form of petition. Craig *v.* Andes, xv. 662.

In New York petition of tax-payers for issue of aid bonds must be absolute in form. If conditioned on certain location the petition is ineffectual. Craig *v.* Andes, xv. 662.

The above principle applies where the application of some of the petitioners only is conditioned on location, the remainder, however, not constituting a majority of tax-payers or property, and the whole being treated as one petition. Craig *v.* Andes, xv. 662.

The petition was signed and the order made in above case prior to passage of act authorizing conditional petitions. *Held*, latter act had no application, and did not validate proceedings. Craig *v.* Andes, xv. 662.

The proceedings in this case, instituted in 1870, were held not affected by the provisions of the New York act of 1870, defining the powers of commissioners appointed under the act of 1869. Craig *v.* Andes, xv. 662.

REGISTRATION.

Outstanding bonds are not entitled to benefit of registration act unless law as to registration is strictly complied with. Bissell *v.* Township of Spring Valley, xv. 585.

Bonds must comply with requisitions of law as to registry and certificate before they are issued. Innocent purchasers are bound to inquire whether law has been complied with. Hoff *v.* Jasper Co., xv. 592.

MUNICIPAL SUBSCRIPTIONS—*Continued.*

Statute requiring State auditor to register municipal bonds, and to certify that all conditions of law as to their issue have been complied with, calls for exercise on his part of no judicial function. Hoff *v.* Jasper Co., xv. 592.

Municipality is not estopped by certificate of State officers registering bonds to deny facts certified to. Dixon Co. *v.* Field, xv. 595.

RECITALS.

Municipality is estopped by recitals of election to deny that same was held in manner provided by law, but it is not estopped to set up lack of power on its part to issue bonds. Northern Bank of Toledo *v.* Trustees, xv. 575.

The general doctrine in reference to the effect of recitals considered. Northern Bank of Toledo *v.* Trustees, xv. 575.

Township is not estopped by recitals in bonds not signed by county clerk as required by law. Bissell *v.* Township of Spring Valley, xv. 585.

Recitals in municipal aid bonds only estop corporation to deny facts which corporate officers had by law authority to determine and to certify. Dixon Co. *v.* Field, xv. 595.

Recital that bond is authorized by certain statute does not estop county to show that issue was not authorized by vote of two thirds of voters as required by constitution. Carroll Co. *v.* Smith, xv. 606.

Bonds are not invalid in hands of bona-fide holders though voted and issued in excess of statutory limit, if recitals import valid issue. Dallas Co. *v.* McKenzie, xv. 622.

Recitals that all necessary legal steps have been taken to comply with statute does not estop town to question validity of bonds in hands of bona-fide holders. Craig *v.* Andes, xv. 662.

INJUNCTION.

Issuing of temporary injunction to restrain municipal officers from issuing aid bonds does not prevent bona-fide holder of bonds issued after injunction from maintaining title. Carroll Co. *v.* Smith, xv. 606.

SUITS.

Aid bonds are debts of county. Holders are entitled to payment out of general fund of county raised by taxation for ordinary use, after exhausting special fund. Knox Co. Ct. *v.* United States ex rel., xv. 624.

In Kansas, Board of County Commissioners may be compelled by mandamus to levy taxes to meet bonded indebtedness, though there is vacancy in office of township trustee. Board Co. Comm. Cherokee Co. *v.* Wilson, xv. 625.

When mandamus to levy taxes to pay municipal bonds is refused on grounds conclusive against right of plaintiff to recover in any action whatever, judgment is conclusive of that fact. Louis *v.* Brown Township, xv. 630.

Suit in United States Circuit Court on municipal bonds by citizens of another State holding bonds by assignment for purposes of suit only will be dismissed altogether as to bonds owned by citizens of same State as municipality and also as to bonds owned by citizens of other States to an amount less than $500. Bernards Township *v.* Stebbins, xv. 634.

DEFENCES.

Purchaser of overdue aid bonds after judgment in suit to which vendor is party that same were void, is bound by judgment. Louis *v.* Brown Township, xv. 630.

Where town commissioners issue bonds without obtaining consent of stockholders and fail to seal them, the township cannot defend against a bona fide holder on that ground. Bernards Township *v.* Stebbins, xv. 634.

Where city without authority guaranteed payment of railroad bonds and on maturity paid them and held them, *held*, that decision of State court that trust deed given to secure bonds enured to benefit of company would be followed in United States Court, and that at any rate subsequent lienholders could not contest lien. Hay *v.* Alexandria & W. R. Co., xv. 647.

MUNICIPALITIES.

See MUNICIPAL SUBSCRIPTIONS.

City ordinance granting right of way in streets and requiring erection of fences, held to amount to contract to latter effect, without special notice. Hayes v. Michigan Central R. Co., xv. 394.

May require railroad to erect guard between its line and public park. Hayes v. Michigan Central R. Co., xv. 394.

NEGLIGENCE.

See ANIMALS; BACKING TRAINS; BLASTING; BRAKES; BRIDGES; CHILDREN; COUPLING CARS; CROSSINGS; DEATH; DERRICK; FENCES; FIRE; FRIGHTENING HORSES; FROGS; HAND-CARS; ICE AND SNOW; LADDERS; LICENSE; LIGHTS; ROUND-HOUSE; SERVANTS; SIGNALS; SPEED; STEPS; STREET CARS; SWITCH; TELEGRAPH; TORPEDO; TRESPASSERS; TRESTLE-WORK; TURN-TABLE.

Iron Co. piled smoke-stacks close to track; a passing train knocked them down on plaintiff, who was a signalman on the railroad. *Held*, question of iron company's negligence was for the jury. Martin v. North Star Iron Works, xv. 156.

Instruction as to negligence need not define certain claimed theories of proof where no principle requisite for recovery is omitted. Matters suppletory in character merely may be omitted. Peoria & P. U. R. Co. v. Clayberg, xv. 356.

The term "culpable" negligence held to be used in same sense as "blamable" negligence. Peoria & P. U. Ry. Co. v. Clayberg, xv. 356.

Where facts found lead to irresistible conclusion of negligence the question is for the court. In all other cases it is for the jury. Hogan v. Chicago, M. & St. P. R. Co., xv. 439.

Where from special findings the court find for defendant, a general verdict for plaintiff will be disregarded. Hogan v. Chicago, M. & St. P. R. Co., xv. 439.

Company is bound to ordinary care of shipper and his servants employed in lading car at chute. In such case company is liable for injury done to such servants by car left unattended on track which is propelled by wind. Union Pac. R. Co. v. Harwood, xv. 494.

NEGLIGENCE (CONTRIBUTORY).

See ANIMALS; BACKING TRAINS; BRAKES; BRIDGES; CHILDREN; COUPLING CARS; CROSSINGS; DEATH; DERRICK; FROGS; HAND-CARS; LADDERS; LICENSE; LIGHTS; ROUND-HOUSE; SERVANTS; STEPS; STREET CARS; SWITCH; TELEGRAPH; TORPEDO; TRESPASSERS; TRESTLE-WORK; TURN-TABLE.

When signalman injured by falling of smoke-stacks piled by iron company near track which are overthrown by passing train, *held*, that neither signalman nor railroad company were guilty of such contributory negligence as to preclude recovery against iron company. Martin v. North Star Iron Works, xv. 156.

Party is not necessarily guilty of contributory negligence because danger might have been seen and avoided, if seen. Baldwin v. St. L., K. & N. W. R. Co., xv. 166.

Where accident occasioning death is not seen, evidence of sober habits of deceased is admissible to disprove contributory negligence. Chicago, etc., R. Co. v. Clark, xv. 261.

The charge as to comparative negligence in this case held good, there being no undue stress laid on the negligence of the company. Peoria & P. U. R. Co. v. Clayberg, xv. 356.

When person on track is killed in Tennessee through failure to observe statutory precautions, his contributory negligence goes in mitigation of damages. Nashville & C. R. Co. v. Smith, xv. 469; East Tenn., Va. & Ga. R. Co. v. Humphreys, Adm'r, xv. 472.

NONSUIT.

Should only be awarded where there is total failure of evidence to sustain plaintiff's case. Carter *v.* Columbia & G. R. Co., xv. 414.

In action for death, motion for nonsuit on ground of contributory negligence will not lie. Carter *v.* Columbia & G. R. Co., xv. 414.

Will not be ordered when evidence, construed as favorably as possible for plaintiff, tends to prove facts necessary to recovery. Fitts *v.* Cream City R. Co., xv. 462.

OFFICERS.

When officers make illegal modification of existing lease there is no remedy in equity unless rights of third parties are affected. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

When officers of corporation enter into agreement corporation itself is not estopped from subsequently applying to have same set aside as fraudulent. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

New board of directors may take steps to annul contract entered into by old board. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

Corporation moving to have illegal contract entered into by its officers set aside is not debarred by judgment entered with assent of officers affirming validity of contract. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

Evidence held insufficient to establish fraud on part of directors in leasing road and subsequently by agreement materially modifying lease. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

Directors cannot alone lease road or materially modify existing lease. Stockholders must unite with board. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

Contracts entered into on behalf of their respective corporations by boards of directors having three members in common are voidable at election of stockholders, even though the three were minority of board adopting contract. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

In above case fact that stockholders knew at time of the election of the three directors that they were directors of the other corporation was immaterial. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

When contractor assigned contract to construct road to president of company who proceeded to construct same, company is liable for injury to servant occasioned by negligence in course of construction. Solomon R. R. Co. *v.* Jones, xv. 201.

ORDINANCE.

City ordinance granting right of way in streets and requiring erection of fences *held* to amount to contract to that effect, without special notice. Hayes *v.* Michigan Central R. Co., xv. 394.

May be passed directing railroad to construct guard between its line and a public park. Hayes *v.* Michigan Central R. Co., xv. 394.

PARENT AND CHILD.

See CHILDREN.

Mother may recover for death of her minor son employed in coupling cars without her consent, though not contrary to her known will. Evidence is not admissible in such case of declarations by son that he knew how to couple cars. Penna. Co. *v.* Long, xv. 345.

Mere fact that company employing minor with parent's consent afterwards changed his duties is not negligence. Texas & Pac. R. Co. *v.* Carlton, xv. 350.

Company may employ minor of years of discretion without parent's consent. In case of injury company can only set up duty of company to minor as its servant. Texas & Pac. R. Co. *v.* Carlton, xv. 350.

When boy of five under charge of brother of nine was killed at crossing, ques-

PARENT AND CHILD—*Continued.*

tion whether boys or their parents were guilty of contributory negligence was for jury. O'Connor *v.* Boston & L. R. Co., xv. 362.

Parents are barred from recovery by their contributory negligence in exposing child to danger. Principle applied where child attempted to get on moving car. Williams *v.* Texas, etc., R. Co., xv. 403.

When child of eighteen months escaped from mother and running on track was killed. *Held*, it was for jury whether mother exercised due care. McGeary *v.* Eastern R. Co., xv. 407.

PASSENGER.

Servant riding to his work on small steam car is not a passenger, and company is not liable to him as such. McQueen *v.* Central Branch Union Pac. R. Co., xv. 226.

PENALTY.

When land-owner building fence in default of company doing so may recover penalty of twice the cost. Wabash, St. L. & P. R. Co. *v.* Zeigler, xv. 519.

PLEADING.

In action for fraud when petition avers that fraud was not discovered until within four years before suit brought, answer charging that cause of action did not accrue within four years before suit brought, because fraud was not committed within said time, is insufficient. Maple *v.* Cincinnati, H. & D. Co., xv. 94.

Allegation that defect in hand-car consisted of hole in bottom of specific dimensions is sufficient. Texas & Pacific Ry. Co. *v.* Kane, xv. 218.

All damages resulting naturally from act complained of may be recovered under general averment of damage. Texas & Pacific Ry. Co. *v.* Kane, xv. 218.

Complaint is not demurrable because it states facts with view of obtaining either legal or equitable relief. Canty *v.* Lattemar et al., xv. 380.

In action for causing death pleadings must state cause of action with reasonable certainty, alleging particular duty and breach thereof. Addison, Adm'r, *v.* Lake Shore & M. S. R. Co., xv. 512.

In action to recover damages for death, complaint stating names of next of kin, relationship to deceased and allegation of damage to them is sufficient. Barnum, Adm'x, *v.* Chicago, M. & St. P. R. Co., xv. 513.

Complaint should contain but one cause of action. Where it states two, in one of which court has no jurisdiction, demurrer for want of facts does not reach defect, and on trial evidence as to cause of action over which the court has no jurisdiction should be excluded. Wabash, St. L. & P. R. Co. *v.* Rooker at al., xv. 558.

Complaint alleging killing of stock by defendant or some lessee thereof or party unknown, is bad on demurrer. Wabash, St. L. & P. R. Co. *v.* Rooker et al., xv. 558.

PRACTICE.

See APPEALS; ARBITRATION; CHAMPERTY; EVIDENCE; JUDGMENT; NONSUIT; PLEADING.

DEMURRERS TO EVIDENCE.

Either party may demur to evidence unless case is clearly against party offering demurrer or court is in doubt as to facts which could be reasonably inferred from evidence. Richmond & D. R. Co. *v.* Moore's Adm'r, xv. 239.

Demurrer to evidence admits all that can reasonably be inferred from adversary's testimony, and waives all evidence which contradicts it. Richmond & D. R. Co. *v.* Moore's Adm'r, xv. 239.

Demurrer to evidence will be overruled unless plaintiff has totally failed to prove his case or a material point at issue. Brown *v.* Atchison, T. & S. F. R. Co., xv. 271.

PRACTICE—*Continued.*

INSTRUCTIONS.

Immaterial erasure in instructions by court is no ground for reversal. Denver & Rio Grande R. Co. *v.* Harris, xv. 142.

Instructions which are misleading, though correct in the abstract, constitute ground for reversal. Union Pac. R. Co. *v.* Fray, xv. 158.

Instructions which are contradictory or are not based on evidence in case constitute ground for reversal. Price *v.* Hannibal & St. J. R. Co., xv. 168; Manning *v.* Burlington, C. R. & N. R. Co., xv. 171.

Court should not charge jury positively as to disputed fact. Texas & Pacific R. Co. *v.* Kane, xv. 218.

When evidence would not support verdict for plaintiff, court will order verdict for defendant. Randall *v.* Balt. & Ohio R. R. Co., xv. 243.

Instruction falsely assuming a fact to be conceded is erroneous. Burlington, C. R. & N. R. Co. *v.* Coates, Adm'r, xv. 265.

Where facts may with certainty be inferred from others proved, the jury may be so instructed. Peoria & P. U. R. Co. *v.* Clayberg, xv. 356.

Where part of point presented is bad, court may refuse it altogether. Carter *v.* Columbia & S. C. R. Co., xv. 414.

Whole charge must be viewed together. East Tenn., Va. & Ga. R. R. Co. *v.* Humphreys, Adm'r, xv. 472.

Point which tends to mislead jury by diverting attention from material evidence should be refused. Alabama Great Southern R. Co. *v.* Jones, xv. 549.

NEW TRIALS.

Where special findings are untrue and answers to special questions vague and unsatisfactory, new trial will be granted. Union Pac. R. Co. *v.* Fray, xv. 158.

New trial will not be granted to enable defendant to defend on new ground, unless he is clearly entitled to verdict. McCune *v.* Northern Pac. R. Co., xv. 172.

Verdict will not be disturbed, though jury might have found the weight of proof the other way. East Tenn., etc., R. Co. *v.* Smith, xv. 224.

Errors of law must be excepted to with particularity to warrant granting of new trial. Louisville, etc., R. Co. *v.* McCoy, xv. 277.

OTHER MATTERS.

In default of jury being summoned, court may order sheriff to summon jury forthwith. Leahy *v.* Southern Pac. R. Co., xv. 230.

Parties may compromise case without intervention of attorneys, notwithstanding prior agreement by plaintiff to pay attorney contingent fee. Lamont *v.* Washington & G. R. Co., xv. 383.

When incompetent evidence is put in, and court afterwards order jury to disregard it, there is no ground for reversal. East Tenn., Va. & Ga. R. R. Co. *v.* Humphreys, Adm'r, xv. 472.

Where it is claimed that there is no evidence to support verdict, question should be presented to county court before judgment. Brownell *v.* Troy & Boston R. Co., xv. 498.

RATIFICATION.

See MUNICIPAL SUBSCRIPTIONS.

RECORDING ACTS.

Where State court has decided that acknowledgment of trust deed is insufficient, U. S. court will not pass on point anew. Hay *v.* Alexandria & W. R. Co., xv. 647.

RECITALS.

See MUNICIPAL SUBSCRIPTIONS.

RECORDS.

When minutes of board of directors show that director voted one way and same were read and approved at ensuing meeting in presence of that director and others, court will decide that director voted in that way, notwithstanding parol evidence to the contrary. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

RECOUPMENT.

In suit for wages, company can only claim to recoup themselves for damages occasioned by negligence of plaintiff to extent of wages earned in particular employment in which negligence occurs. Emery *v.* St. Louis, K. & N. W. R. Co., xv. 123; Harlan *v.* St. Paul, M. & M. R. Co., xv. 130.

REGISTRATION.

See MUNICIPAL SUBSCRIPTIONS; RECORDING ACTS.

RESCISSION.

Equity will not interfere at instance of stockholders to cancel modification of lease by officers, as there is sufficient remedy at law. But will do so if rights of third parties intervene and are affected. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

When bill is filled to rescind agreement modifying lease, fact that original lease was without authority of law and that effect of the decree sought would be to reinstate same cannot be set up where it does not follow that such would be effect of decree. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

Party entitled to rescission of illegal agreement though parties cannot be placed in statu quo. Tender need not be made to other party knowingly entering into such agreement, of money expended in pursuance thereof. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

ROADS.

See STREETS.

ROUND-HOUSE.

When servant is killed while lying asleep in round-house, his administrator can recover no damages. Price *v.* Hannibal & St. J. R. Co., xv. 168.

Where servant is injured by falling into hole in floor of round-house and there is no evidence that he was ever employed there before, it is error for the court to submit that question to jury. Manning *v.* Burlington, C. R. & N. R. Co., xv. 171.

RULES AND REGULATIONS.

Where rule is to provide watchmen to guard defective car under which men are working, and company fails to do so and injury occurs to workman in consequence, question of negligence is for jury. Luebke *v.* Chicago, M. & St. P. R. Co., xv. 183.

In case of injury from unblocked frog, order of company to block all frogs may be put in evidence. Burlington, C. R. & N. R. Co. *v.* Coates, Adm'r, xv. 265.

SEALS.

See MUNICIPAL SUBSCRIPTIONS.

SERVANTS.

CONTRACT OF EMPLOYMENT—WAGES.

In action for wages, court should pass upon question whether servant has not by accepting extra compensation made him on lease of road waived his right to

SERVANTS—*Continued.*

three months' notice of termination of his employment. Nashua & Lowell R. R. Co. *v.* Paige, xv. 120.

In suit for wages by carpenter, company set up as defence a cross-claim for damages to engine caused by negligence of plaintiff, who had been especially assigned to watch it for one night. *Held*, that the set-off could only be allowed to the extent of the plaintiff's wages for that night. The residue of set-off being founded on cross-action of which the court had no jurisdiction, was not allowed, though defendant did not ask judgment for possible surplus in his favor. Emery *v.* St. Louis, K. & N. W. R. Co., xv. 122.

In action for wages defendant may set off damages occasioned to him by negligence of plaintiff in his employment, and may have judgment for any balance due him. Harlan *v.* St. Paul, M. & M. R. Co., xv. 130.

Contract that servant should make deposit and that officer of corporation should be sole judge as to whether corporation was entitled to hold all or any part of it on account of misconduct of servant, is void, as ousting jurisdiction of court. White *v.* Middlesex R. Co., xv. 131.

DECLARATIONS.

Declarations of engineer at time of accident as to cause are admissible as part of res gestæ. McLeod *v.* Ginther's Adm'r, xv. 291.

TORTS OF SERVANTS.

Corporation is liable for negligence or misconduct of servant as is natural person. Hughes *v.* Cincinnati & S. R. Co., xv. 100.

Company may maintain action against person maliciously causing arrest of engineer running train. Pleadings need not aver result of defendant's suit against servant when same is admitted to be malicious and false. St. Johnsbury & L. C. R. R. Co. *v.* Hunt, xv. 113.

Company is not liable for damage occasioned by spreading of fire kindled by section men repairing road under section foreman, in order to prepare food. Marrier *v.* St. Paul, M. & M. R. Co., xv. 135.

Company not liable for act of conductor in wrongfully chasing and seizing boy and carrying him off on railroad train. Gilliam *v.* S. & N. Ala. R. Co., xv. 138.

DUTY OF COMPANY.

When servants of road under command of officers, and armed with deadly weapons, attacked servants of another road and took forcible possession thereof; *held*, that there was evidence to go to a jury to establish the liability of the company for a personal injury inflicted by said servants in such attack. Denver & Rio Grande R. Co. *v.* Harris, xv. 142.

Brakeman was directed by engineer to look back at point where track ran between high banks of snow. He stepped to side and fell, but there was no evidence to show that he had been struck by the snow-bank: *held*, that there was no evidence of negligence on part of company. Burlington, Cedar R. & N. R. Co. *v.* Dowell, xv. 153.

Company is not negligent to servants in letting snow-bank stand as left by snow-plough. Burlington, C. R. & N. R. Co. *v.* Dowell, xv. 153.

When signal-man was injured by falling of smoke-stacks placed by iron company near track, which are overthrown by passing train; *held*, in suit against iron company, that question of negligence was for jury, and that neither plaintiff nor railroad company was guilty of contributory negligence. Martin *v.* North Star Iron Works, xv. 156.

Reversal of engine in switching and making up trains is not negligence per se. Jackson *v.* K. C., L. & S. K. R. R. Co., xv. 178.

Company is bound as to its servants to keep track free of all obstructions dangerous to life. Wilson *v.* Denver, S. P. & P. R. Co., xv. 192.

When injury to servant is alleged to have been caused by negligence of company in permitting obstruction to be on track, without negligence on plaintiff's

SERVANTS—*Continued.*

part, a prima-facie case of negligence is made out. Wilson v. Denver, S. P. & P. R. Co., xv. 192.

It will be presumed that company built road, and company is liable accordingly for injury to servant occasioned by defect in hand-car used in constructing road. Solomon R. R. Co. v. Jones, xv. 201.

When contractor to build road assigned contract to president of railroad company, who thereupon proceeded to construction, company is liable for injury to servant occasioned by negligence in course of construction. Solomon R. R. Co. v. Jones, xv. 201.

Company liable to servant injured by latent defect in hand-car which has not been properly inspected after collision causing patent defects. What is proper inspection is for jury. Solomon R. R. Co. v. Jones, xv. 201.

Company held liable for injury to servant caused by patent defect in iron mail furnished to him by section boss with which to drive spikes. Guthrie v. Louisville & Nashville R. Co., xv. 209.

When section foreman is injured by defect in hand-car, he is not debarred from recovery on the ground that it was his duty to supervise repairs of hand-cars on his section. Texas & Pac. Ry. Co. v. Kane, xv. 218.

Servant riding to work on small steam-car is not a passenger, and company is not liable to him as such. McQueen v. Central Branch U. P. R. Co., xv. 226.

Whether defect in brake could have been discovered by reasonable care on part of the company, was for the jury. Leahy v. Southern Pac. R. Co., xv. 230.

Where evidence showed that accident was occasioned by fracture of old form of brake less effectual than newer form to stop train, but as to safety of which compared with old form plaintiff's evidence was contradictory, *held* that there was no evidence of negligence for the jury. Disher v. N. Y. Central, etc., R. Co., xv. 233.

Company held liable for death of freight conductor from defect in ladder of freight car. Richmond & D. R. Co. v. Moore's Adm'r, xv. 239.

The company not held negligent in construction and arrangement of ground switch. Randall v. Baltimore & Ohio R. R. Co., xv. 243.

Where servant was injured through mistaking damaged for sound car; *held*, burden was on him to prove negligence of company in the premises. Fraker v. St. Paul, etc., R. Co., xv. 256.

When party injured while coupling cars by being crushed against adjacent platform, *held*, that if party was not guilty of contributory negligence, company was not guilty of negligence. Chicago, etc., R. Co. v. Clark, xv. 261.

Where injury was occasioned in coupling cars by unblocked frogs, witness cannot be asked what danger is from that source, or whether a person coupling cars could see frog on track. Burlington, C. R. & N. R. Co. v. Coates, Adm'r, xv. 265.

When party killed in coupling box-cars with projecting timbers, *held* that evidence tended to show negligence on part of company. Brown v. Atchison, T. & S. F. R. Co., xv. 271.

Railroad is bound to take ordinary and not extraordinary care for the safety of its servants. Gross negligence defined. Louisville, etc., R. Co. v. McCoy, xv. 277.

In action for injury while coupling cars, court will not strike out allegation in complaint that draw-bars were "defective and insufficient." Tierney v. Burlington, C. R. & N. R. Co., xv. 290.

May recover for injury partly caused by defect in trestle-work and partly by negligence of fellow-servants. Elmer v. Locke, xv. 300.

DUTY AS TO CARS AND TRACKS OF OTHER COMPANIES.

Company not liable for injury to servant from defective car received from another company. It is only bound to provide suitable and competent inspectors of such cars. Mackin v. Boston & Albany R. Co., xv. 196.

Company buying its road from another company is bound as to its servants not only to maintain bridges in as good repair as when purchased, but to supply

SERVANTS—*Continued.*

all patent defects in original construction. Vosburg *v.* Lake Shore & M. S. R. Co., xv. 249.

Company need not haul car of another company which is so defective as to be dangerous to its servants. Texas & Pacific R. Co. *v.* Carlton, xv. 350.

Company not liable for death of brakeman occasioned by low bridge of another company. Gibson *v.* Midland R. Co., xv. 507.

RULES AND REGULATIONS.

Where custom and rule of company is to provide watchman to protect defective car under which employees are working, and an injury is occasioned by failure to do this, question of negligence is for jury. Luebke *v.* Chicago, M. & St. P. R. Co., xv. 183.

Whether or not brakeman used club to set up brake contrary to rules was for the jury. Leahy *v.* Southern Pac. R. Co., xv. 230.

In case of injury from unblocked frog, order of company to block all frogs may go in evidence. Burlington, C. R. & N. R. Co. *v.* Coates, Adm'r, xv. 265.

MINOR SERVANTS.

Company negligently backing freight car so as to injure minor son of employee of another company assisting his father in rightfully repairing car, is liable in damages. Penna. Co. *v.* Gallagher, xv. 341.

When deceased was a minor and was killed while coupling cars, declarations by him that he knew how to couple cars are inadmissible. Penna. Co. *v.* Long, xv. 345.

Mother may recover for death of her minor son employed in coupling cars without her consent, though not against her known will. Penna. Co. *v.* Long, xv. 345.

Whether company is negligent in setting inexperienced minor to couple cars, one with ordinary draw-bar and one with Miller draw-bar, without special instructions, is for jury. Penna. Co. *v.* Long, xv. 345.

Mere fact that company employs minor with parent's consent in one capacity and then changes his duties is not negligence. Texas & Pac. R. Co. *v.* Carlton, xv. 350.

Company may employ minor of years of discretion without parent's consent. In case of injury father can only set up duty of company to minor as its servant. Texas & Pac. R. Co. *v.* Carlton, xv. 350.

CONTRIBUTORY NEGLIGENCE AND RISKS OF EMPLOYMENT.

When servant is employed in operating derrick, and is with others charged with duty of keeping rope wet, and he fails to do so and it breaks, injuring him, he cannot recover. Union Pac. R. Co. *v.* Fray, xv. 158.

When servant was injured by fall of pile of lumber, he was not necessarily guilty of contributory negligence because he might have seen the danger and avoided it. Fact ought to be considered by jury. Baldwin *v.* St. L., K. & N. W. R. Co., xv. 166.

Servant going to sleep in round-house takes risk of employment. His administrator cannot recover damages for death occasioned by his being run over while so lying. Price *v.* Hannibal & St. J. R. Co., xv. 168.

When servant employed as sweeper is injured by falling into hole in round-house, and there is no evidence that he was ever employed in round-house before, it is error for the court to submit latter question to jury. Manning *v.* Burlington, C. R. & N. R. Co., xv. 171.

In action by servant to recover damages occasioned while working on bridge by alleged insufficient stay-lath where contributory negligence in using stay-lath as scaffold was set up and verdict was rendered against company, new trial was not granted to allow opportunity to defend on ground of accident, as it was not clear that verdict would be for defendant. McCune *v.* Northern Pac. R. Co., xv. 172.

In action by servant to recover for injury occasioned by insufficient stay-lath

SERVANTS—*Continued.*

on bridge where he was working, where contributory negligence was set up in using stay-lath as scaffold and verdict was for plaintiff, new trial was not granted. McCune *v.* Northern Pac. R. Co., xv. 172.

Conductor injured by using defective step as to condition of which he has notice, is guilty of contributory negligence. Jackson *v.* K. C., L. & S. K. R. R. Co., xv. 178.

There can be no recovery for death of brakeman on moving train caused by striking a bridge, where evidence wholly fails to show that deceased was using due care. Riley, Adm'x. *v.* Conn. River R. Co., xv. 181.

When servant goes under defective car on siding to repair same, this is not a dangerous service, risks of which he takes on himself. Luebke *v.* Chicago, M. & St. P. R. Co., xv. 183.

Repairman injured while travelling on hand-car which collided with extra train running without notice, according to custom of company: *held*, to have run risk of his employment and not to be entitled to recover. Pennsylvania R. R. Co. *v.* Wachter, xv. 187.

When servant has complained of defect in engine and master has promised to fix it, servant may recover for injury occasioned by subsequent use of engine, if defect does not indicate imminent danger. Greene *v.* Minneapolis & St. L. R. Co., xv. 214.

Where servant complained of defects in hand-car and officers promised it should be repaired, servant may without contributory negligence continue to use car a reasonable time. Texas & Pacific Ry. Co. *v.* Kane, xv. 218.

When servant knows of defect in lever of hand-car, and continues nevertheless to use it and is injured in consequence, he cannot recover. East Tenn., etc., R. Co. *v.* Smith, xv. 224.

When servant might by reasonable care have escaped injury from defective lever of hand-car, he cannot recover therefor. East Tenn., etc., R. Co. *v.* Smith, xv. 224.

Servant continuing to ride in hand-car, wheels of which had patent defect; *held*, debarred from recovering for injury occurring in consequence. McQueen *v.* Central Branch Northern Pac. R. Co., xv. 226.

Freight conductor not held guilty of contributory negligence in mode of using defective ladder on freight-car. Richmond & D. R. Co. *v.* Moore's Adm'r, xv. 239.

Where brakeman was injured by defect in brake of damaged car which he was engaged in hauling in yard: *held*, it was a risk of his employment. Yeaton *v.* Boston & Lowell R. Corp., xv. 253.

Where proper rules are established, risk of handling broken cars must be presumed to be run by one employed in that work. Fraker *v.* St. Paul, etc., R. Co., xv. 256.

Where accident was not seen, evidence of sober habits of deceased was admissible to disprove contributory negligence. Chicago, etc., R. Co. *v.* Clark, xv. 261.

Evidence as to usual mode of coupling and uncoupling cars at certain switch is not admissible to show freedom from contributory negligence. Chicago, etc., R. Co. *v.* Clark, xv. 261.

Company is not bound to warn servants of all dangers. Presumption is that they understand nature and dangers of employment. Chicago, etc., R. Co. *v.* Clark, xv. 261.

Where servant coupling cars had actual notice of danger from unblocked frogs and was killed, burden of proof is on his administrator to show freedom from contributory negligence. Burlington, C. R. & N. R. Co. *v.* Coates, Adm'r, xv. 265.

When party killed in coupling cars with projecting timbers: *held*, that the evidence did not necessarily show contributory negligence. Brown *v.* Atchison, T. & S. F. R. Co., xv. 271.

Contributory negligence in coupling cars does not prevent recovery for injury occasioned by gross negligence. Louisville, etc., R. Co. *v.* McCoy, xv. 277.

Verdict for plaintiff in accident for injury to brakeman coupling cars occa-

SERVANTS—*Continued.*

sioned by fall into ditch, where evidence was conflicting as to how far plaintiff knew of danger, was left undisturbed. Houston & T. C. R. Co. v. Finan, xv. 386.

It is negligence to back train against other cars except on signal of brakeman detailed to couple. Party injured in this way may recover, notwithstanding his contributory negligence in stepping between cars. Hanick v. Chicago, R. I. & P. R. Co., xv. 268.

NEGLIGENCE OF FELLOW-SERVANTS.

(1) WHEN COMPANY LIABLE.

Under Kansas statute company is only liable for injury to servant by fellow-servant where act or omission causing injury is that of agent or employee having duty or authority in premises. Solomon R. R. Co. v. Jones, xv. 201.

Where engineer was killed by joint misconstruction with conductor of equivocal telegram: *held*, under statute of Kentucky, that company was liable. McLeod v. Ginther's Adm'r, xv. 291.

When laborer was injured in blasting through negligence of foreman or head boss: *Held*, that the two were not fellow-servants, and that the company was liable. Gilmore v. Northern Pac. R. Co., xv. 304.

When brakeman is injured by failure of road-master to keep track in safe condition, company is liable. Atchison, T. & S. F. R. Co. v. Moore, xv. 319.

When brakeman acts under orders of engineer, they are not fellow-servants. Nashville, C. & St. L. R. Co. v. Wheless, xv. 315.

Foreman is not fellow-servant of employee under him whom he has right to employ and discharge as to acts which are the result of the exercise of the authority conferred upon him. Chicago & A. R. Co. v. May, xv. 320.

Company is liable for injury occasioned by failure of boss car repairer to provide for safety of those working under him. As to these, he is a vice principal and not a fellow-servant. Hannibal & St. J. R. Co. v. Fox, xv. 320.

(2) WHEN NOT LIABLE.

Court may properly refuse to charge that company is liable to its servants for the negligence of its other servants and employees. Baldwin v. St. L., R. & N. W. R. Co., xv. 166.

Company is not liable for injury to repairman on hand car by reason of failure of fellow-servants on approaching engine to show headlight in foggy weather. Pennsylvania R. R. Co. v. Wachter, xv. 188.

Car-inspector and brakeman are fellow-servants. Company is not liable for injury to latter caused by negligence of former. Mackin v. Boston & Albany R. Co., xv. 196.

Brakeman working ground switch and engineman on train are fellow-servants, and neither can recover for injury caused by negligence of the other. Randall v. Baltimore & Ohio R. R. Co., xv. 243.

Failure of engineman to sound statutory signal on approaching crossing does not render company liable for injury occasioned thereby to brakeman also a fellow-servant. Randall v. Balt. & Ohio R. R. Co., xv. 248.

Foreman handling damaged cars and subject to orders of railroad and others, is fellow-servant of person employed under him. The latter cannot therefore recover from company for injury caused by foreman's negligence. Fraker v. St. Paul, etc., R. Co., xv. 254.

Where engineer is killed by fault of train dispatcher, there can be no recovery without affirmatively showing that the two were not fellow-servants. [illegible] v. St. Louis, K. C. & N. R. Co., xv. 264.

Engineer and brakeman on train are usually fellow-servants. The latter cannot recover for injury occasioned by negligence of the other. Nashville, C. & St. L. R. Co. v. Wheless, xv. 315.

Foreman having right to discharge and employ laborers stands to them in relation of servant with laborer under him as to acts upon which he is employed to perform those under him. Chicago & A. R. Co. v. May, xv. 320.

Station-agent has charge of track over station, and is [illegible]

SERVANTS—*Continued.*

neer on train. Company is not liable for injury to latter by negligence of former as to such tracks. Brown v. Minneapolis & St. L. R. Co., xv. 333.

The injury in this case occurred by negligence of fellow-servant, who was not shown to have "charge or control" of the subject within the meaning of the Employer's Liability Act. Company was accordingly not held liable. Gibbs et al. v. Great Western R. Co., xv. 356.

(3) Other Matters.

Two years' limitation applies to actions against railroad companies for injury occasioned by negligence of a fellow-employee in all cases under the Kansas statute. Atchison, T. & S. F. R. Co. v. King, xv. 330.

Sunday Laws.

Conductor in street-car running on Sunday cannot recover for injuries occasioned by collision with another car. Day v. Highland St. R. Co., xv. 150.

SET-OFF.

Court cannot admit a set-off arising on a distinct ground of action by defendant against plaintiff unless it has jurisdiction in such actions, even though defendant declines to ask judgment for excess in his favor. Emery v. St. Louis, K. & N. W. R. Co., xv. 123.

In action for wages company may set off damages occasioned by negligence of plaintiff in his employment, and may have judgment for any balance due him. Harlan v. St. Paul, M. & M. R. Co., xv. 130.

SIGNALS.

See Crossings.

Failure of engineman to sound signals on approaching crossing does not render company liable for injury thereby occasioned to brakeman, who is fellow-servant. Randall v. Balt. & Ohio R. Co., xv. 243.

Failure to give signals in moving car at crossing, *held*, with other facts, to be evidence of negligence. Lake Erie & W. R. Co. v. Zoffinger, xv. 370.

Company not liable for running over licensee on track with backing train giving signal. Hogan v. Chicago, M. & St. P. R. Co., xv. 439.

Statutes requiring sign-boards and signals have no application in case of person travelling on road near and parallel to track. East Tenn., V. & G. R. R. Co. v. Feathers, xv. 446.

Statute requiring signal on approaching crossing is only intended to provide a warning to those crossing or intending so to do. It has no application when by reason of failure to give signal parties are induced to approach so close that their horses are frightened by noise of train and so injury ensues. Rosenberger v. Grand Trunk R. Co., xv. 448.

When person is seen on track Tennessee statute requires alarm whistles to be sounded, but does not specify number and character of whistles. Dinwiddie v. Louisville & N. R. Co., xv. 483.

Under Alabama statute company is bound as to cattle at crossing only to give signal when within a quarter of a mile. Alabama Great Southern R. Co. v. McAlpine & Co., xv. 544.

SNOW.

See Ice and Snow.

SPEED.

In this case speed of car in approaching crossing constituted with other facts evidence of negligence. Lake Erie & W. R. Co. v. Zoffinger, xv. 370.

SPARKS.

See Fire.

STATUTE.

When injury occasioning death has occurred, subsequent statute giving new cause of action is inapplicable. Chicago, St. L. & N. O. R. Co. *v.* Pound's Adm'r, xv. 510.

Act may both authorize issue of municipal aid bonds and validate defective bonds already issued. Otoe Co. *v.* Baldwin, xv. 563.

Act entitled "an act to amend charter of the C. & St. L. R. Co." may contain provision legalizing invalid municipal elections to subscribe to company's stock. Jonesboro *v.* Cairo & St. L. R. Co., xv. 615.

STEPS.

Conductor injured in using defective step, of condition of which he has notice, is guilty of contributory negligence. Jackson *v.* K. C., L. & S. K. R. R. Co., xv. 178.

STOCKHOLDERS.

Proceedings instituted by one stockholder to set aside alleged illegal agreement of corporation enure to advantage of all. Other stockholders are not guilty of laches in failing to institute or join in such proceedings. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

Are not guilty of laches in not acting together to set aside alleged illegal corporate agreement. Can only be expected to act together at meeting regularly convened to elect officers. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

When party has filed bill of peace, and has obtained injunction to restrain stockholders of corporation from moving to set aside illegal agreement, he cannot set up laches on their part in not so moving. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

Must unite with directors in lease of road or material modification of existing lease. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

May elect to avoid contracts entered into by boards of directors having three members in common on behalf of their respective corporations, and this though the three directors in question were minority of board adopting contract. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

In above case fact that stockholders knew at time of election of the three directors that they were directors of the other corporation was immaterial. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

STREETS.

Ordinance granting right of way in streets and requiring erection of fences *held* to amount to contract, and to enable any one injured through failure to provide fences to recover damages. Hayes *v.* Michigan Central R. Co., xv. 394.

When child strayed from public park to track on street and was injured, jury may inquire whether injury would have occurred if company had built guard as required by ordinance. Hayes *v.* Michigan Central R. Co., xv. 394.

When sleigh was injured by projecting catch of turn-table of street-car company, question was for jury whether company was negligent in retaining that style of turn-table. Fitts *v.* Cream City R. Co., xv. 462.

Company in constructing track on street raised it above surface, failed to furnish flagman at crossing, and ran train without brakeman in front. A horse ran away in consequence, killing its driver. The company was held liable, the complaint being sufficiently definite. Johnson *v.* St. Paul & D. R. Co., xv. 467.

Company is liable for injury caused by leaving obstructions on margin of highway used for twenty years but never surveyed. Brownell *v.* Troy & Boston R. Co., xv. 498.

STREET RAILWAYS.

Running of street-car on Sunday is illegal, though some of passengers are lawfully riding. Day *v.* Highland St. R. Co., xv. 150.

STREET RAILWAYS—*Continued.*

Conductor on street-car running on Sunday cannot recover for injury occasioned by collision with another car. Day *v.* Highland St. R. Co., xv. 150.

Street cars not bound to have such lights as will enable driver with aid of street lights to avoid injury. Memphis City R. Co. *v.* Logue, Admr., xv. 459.

Street railway company must construct and maintain its road in safe condition, with due regard to safety and convenience of public. Fitts *v.* Cream City R. Co., xv. 462.

STREET CAR.

When sleigh was caught by catch of turn-table out of repair, jury had to decide whether company was negligent in retaining that style of turn-table. Fitts *v.* Cream City R. Co., xv. 462.

SUBSCRIPTIONS BY MUNICIPALITIES.

See MUNICIPAL SUBSCRIPTIONS.

SUNDAY.

Running of street car on Sunday is illegal, though some of the passengers are lawfully riding. Day *v.* Highland St. R. Co., xv. 150.

Conductor in street car running on Sunday cannot recover for injuries occasioned by collision with another car. Day *v.* Highland St. R. Co., xv. 150.

SWITCH.

The company not held liable for construction and arrangement of ground-switch. Randall *v.* Baltimore & Ohio R. R. Co., xv. 243.

TELEGRAPH.

When engineer was killed by joint misconstruction with conductor of equivocal telegram, *held* under Kentucky statute that company was liable. McLeod *v.* Ginther's Admr., xv. 291.

TORPEDO.

Company not liable for death of person caused by intermeddling with signal torpedo on track. Carter *v.* Columbia & S. C. R. Co., xv. 414.

TOWNS AND TOWNSHIPS.

See MUNICIPAL SUBSCRIPTIONS.

TRACKS.

See FROGS; SERVANTS; SWITCHES; TRESPASSERS.

TRESPASSERS.

Where child strayed from public park on road and was injured, jury may inquire whether injury would or would not have occurred if company had performed its duty and built a guard. Hayes *v.* Michigan Central R. Co., xv. 394.

Where child attempted to leap on moving car with no one on it, but this was not imputed as negligence, and the parents knew the danger to which the child was exposed, *held*, there could be no recovery for injury by parents. Williams *v.* Texas, etc., R. Co., xv. 408.

When child of eighteen months escaped from its mother in house and ran on track and was injured, *held*, it was for jury whether mother exercised due care. McGeary *v.* Eastern R. Co., xv. 407.

Person killed while walking on track by locomotive with bright headlight coming in opposite direction *held* guilty of contributory negligence. Bacon et al. *v.* Baltimore & P. R. Co., xv. 409.

TRESPASSERS—*Continued.*

Company not liable for death caused to person intermeddling with signal torpedo on track. Carter *v.* Columbia & G. R. Co., xv. 414.

Person walking on railroad track does not do so absolutely at his peril. Company owes duty to him in some cases. Carter *v.* Columbia & S. C. R. Co., xv. 414.

Company is liable for injury occasioned by expulsion of drunken trespasser from moving train by conductor. Louisville, N. A. & C. R. Co. *v.* Dunkin, xv. 423.

Where public had used tracks for long time, jury might say whether company had acquiesced in user. If so, company owed greater duty of care to public using track, and it was for jury whether leaving boiler near track unattended so that it exploded was or was not negligence. Davis *v.* Chicago & N. W. R. Co., xv. 424.

Statute forbidding persons to walk on railroad track is inapplicable in case of user by permission. Davis *v.* Chicago & N. W. R. Co., xv. 424.

Company not liable for running over licensee on track with backing train giving signals. Hogan *v.* Chicago, M. & St. P. R. Co., xv. 439.

When woman got on track in full sight of engine and was killed, *held* that her contributory negligence barred an action at common law, and went in mitigation of damages under a count for failure on part of railroad company to observe statutory precautions. Nashville & C. R. Co. *v.* Smith, xv. 469.

When engineer on seeing boy asleep on track failed to adopt statutory precautions and ran over and killed him, company was held liable. Boy's contributory negligence was admissible in evidence in mitigation of damages. East Tenn., Va. & Ga. R. R. Co. *v.* Humphreys, Admr., xv. 472.

In suit to recover for killing person on track in Tennessee for failure to observe statutory precautions, same measure of proof is not necessary as to convict engineer of felony. East Tenn., Va. & Ga. R. R. Co. *v.* Humphreys, Admr., xv. 472.

A man of intemperate habits was found dead at close of rainy night on railroad bridge which he was accustomed to use. *Held* that there was no evidence of negligence by railroad company for jury. State *v.* Phila., W. & B. R. Co., xv. 481.

When person is seen lying on track, Tennessee statute requires alarm-whistles to be sounded, but does not specify number and character of whistles. Dinwiddie *v.* Louisville & N. R. Co., xv. 483.

Tennessee statute does not require company to have more than reasonable number of brakemen. It does not require one to each car. Dinwiddie *v.* Louisville & N. R. Co., xv. 483.

When person was killed in running on track in front of train at night to board train on another track, the act amounts to an exposure to obvious or unnecessary danger within meaning of life-insurance policy. Tuttle *v.* Travellers' Ins. Co., xv. 490.

TRESTLE-WORK.

Servant may recover for injury occasioned in part by defect in trestle-work and in part by negligence of fellow-servants. Elmer *v.* Locke, xv. 300.

TURN-TABLE.

When sleigh was injured in street by projecting catch of turn-table of street-car company, it was for jury whether or not it was negligence on the part of the company to retain that style of turn-table. Fitts *v.* Cream City R. Co., xv. 462.

ULTRA VIRES.

As to the rights and powers of stockholders to annul ultra vires agreement entered into by officers. Metropolitan Elevated R. Co. *v.* Manhattan R. Co. et al., xv. 1.

UNITED STATES COURTS.

The latest decision of a State court will not be followed by the Supreme Court of the United States when it is in conflict with previous decisions and when not made at time when rights in suit were acquired. Carroll Co. *v.* Smith, xv. 606; Green Co. *v.* Conness, xv. 613.

Suit in U. S. Circuit Court on municipal bonds by citizen of another State holding bonds by assignment for purposes of suit only, will be dismissed altogether as to bonds owned by citizens of same State as municipality, and also as to bonds owned by citizens of other States to a less amount than $500. Bernards Township *v.* Stebbins, xv. 634.

Where State court has decided that acknowledgment of trust deed giving preference is insufficient, U. S. court will not pass on point anew. Hay *v.* Alexandria & W. R. Co., xv. 647.

City without authority guaranteed payment of railroad bonds, and on maturity paid same and took assignment. The State court *held* that the trust deed given to secure the bonds enured to benefit of city. U. S. court in subsequent litigation followed State court. Hay *v.* Alexandria & W. R. Co., xv. 647.

Four judgments were assigned to A, a non-resident: two were assigned by residents and two by non-residents. *Held* that A might sue in Federal court to have entry of fraudulent satisfaction on all four set aside. Hay *v.* Alexandria & W. R. Co., xv. 647.

Federal court will not review action of State court where Federal question raised was not raised below and State court could not therefore pass upon it. Santa Cruz Co. Supervisors *v.* Santa Cruz R. R. Co., xv. 661.

WAGES.

In action for wages, court should pass upon question whether servant has not by accepting extra compensation made him on lease of road waived his right to three months' notice of termination of his employment. Nashua & Lowell R. R. Co. *v.* Paige, xv. 120.

In suit for wages by carpenter, company set up as defence a cross-claim for damages to engine caused by negligence of plaintiff who had been specially assigned to watch it for one night. *Held* that the set-off could only be allowed to the extent of plaintiff's wages for that night. The residue of set-off being founded on cross-action of which court had no jurisdiction was not allowed, though defendant did not ask judgment for possible surplus in his favor. Emery *v.* St. Louis, K. & N. W. R. Co., xv. 122.

In action for wages, defendant may set off damages occasioned to him by negligence of plaintiff in his employment, and may have judgment for any balance due him. Harlan *v.* St. Paul, M. & M. R. Co., xv. 130.

WAIVER.

Question as to whether servant accepting extra compensation made him on lease of road has or has not waived right to three months' notice of termination of his employment is for court. Nashua & Lowell R. R. Co. *v.* Paige, xv. 120.

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